Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

WAYNE ALARIE, RICHARD MARTIN, JAMES DZIADZIOLA AND DONALD DURECKI,
Petitioners,

v.

SHELDON L. MILLER, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it was a violation for the Fourteenth Amendment to the United States Constitution for Justice Robert Young of the Michigan Supreme Court not to participate in the proceedings before the Michigan Supreme Court in Michigan Supreme Court Number 140079, when he acknowledged there was no basis for his disqualification and his tenuous connection to the underlying case had no relevance to the matter pending.

PARTIES TO THE PROCEEDINGS

Wayne Alarie
Richard Martin
James Dziadziola
Donald Durecki

Petitioners

Sheldon L. Miller
Grievance Administrator
for the State of Michigan
Justice Robert P. Young, Jr.

Respondents

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PETITION FOR WRIT OF CERTIORARI

Complainants, Wayne Alarie, Richard Martin, James Dziadziola, Donald Durecki, respectfully petitions for a Writ of Certiorari to review the decisions of the Michigan Supreme Court in this case.

OPINIONS BELOW

The Opinion of the Michigan Supreme Court dated September 29, 2010 is unreported (See Pet. App. 1a). The Opinion of the Michigan Supreme Court dated June 11, 2010 is unreported (See Pet. App. 3a). The Opinion of the Michigan Supreme Court dated May 7, 2010 is unreported See (Pet. App. 9a). The Opinion of the Michigan Supreme Court dated April 16, 2010 is unreported (See Pet. App. 12a).

JURISDICTION

A final decision in this case was rendered by the Michigan Supreme Court on September 29, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Relevant portions of the Fourteenth Amendment to the United States Constitution are as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 20, 2006, a Formal Complaint was filed by the Grievance Administrator for the State of Michigan against Sheldon L. Miller, an attorney licensed to practice law in the State of Michigan. (See Pet. App. 39a). The Grievance Administrator's Complaint alleged 19 counts of misconduct in attorney Miller's representation of the Complainants, Richard Martin, Wayne Alarie, Donald Durecki and James Dziadziola in the underlying case known as Dumas v. Auto Club of Michigan, Wayne County Circuit Court No. 83-376603-CK. (See Pet. App. 39a).

In the Dumas case, attorney Miller represented approximately 150-200 plaintiffs against their then current or former employer, the Automobile Club of Michigan. Among the Counts included in the Dumas Complaint was a claim for wrongful discharge based on a sales quota system implemented by the Auto Club which was allegedly discriminatory against older sales staff and also in violation of employment "contract" law as it existed in Michigan at that time. Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579 (1980); 292 N.W.2d 880 (1980).

The Grievance Administrator's Complaint against attorney Miller alleged, among other things that Miller failed to inform Complainants of an adverse ruling that occurred before they were added to the lawsuit, which essentially had dismissed their aforesaid

wrongful discharge claim as it related to employment "contract" law leaving only the wrongful discharge claim based on age discrimination. (See Pet. App. 44a-45a).

Additional misconduct was asserted that centered around Mr. Miller's failure to inform and to obtain consent from his discharged clients before abating their remaining wrongful discharge claims based on age discrimination by placing them on an unauthorized Stay while prioritizing the claims of other clients who had not been discharged. (See Pet. App. 47a-49a).

The Complaint also alleged that attorney Miller failed to provide the Complainants with sufficient information to allow them to make informed decisions as to the representation and instead was providing them with false information, all of which violated the Michigan Rules of Professional Responsibility. (See Pet. App. 57a and 59a).

After listening to hours of testimony, on April 8, 2008, the Hearing Panel concluded that attorney Miller's conduct violated the Michigan Rules of Professional Conduct as to one of the alleged Counts. An Order of reprimand was issued by the Attorney Grievance Commission on November 26, 2008. The individual Complainants then filed a Petition for Review with the Attorney Discipline Board for the State of Michigan on December 15, 2008 objecting to the findings by the Panel on the 18 remaining Counts for which no misconduct was found.

On March 6, 2009, attorney Miller filed a Motion to Allow a Delayed Cross Petition for Review with the

Attorney Discipline Board, claiming that the Reprimand should be overturned as the Michigan Rules of Professional Conduct were not adopted by this Court until October 1, 1988, and therefore, did not apply to conduct that took place in 1984 and 1985.

The Attorney Discipline Board (ADB) held a hearing in this matter on June 23, 2009. Ultimately, in an Order dated October 30, 2009, the Attorney Discipline Board, vacated the Hearing Panel's Order of Reprimand and dismissed the formal Complaint, ruling that since the Michigan Rules of Professional Conduct were not adopted until 1988, they did not apply to conduct that took place in 1984 and 1985 despite the fact that the misconduct, nonetheless, may have occurred. The ADB also allowed the dismissal of the other 18 Counts to stand.

In accordance with Michigan Court Rule 9.122, the individual Complainants filed an Application for Leave to Appeal with the Michigan Supreme Court, the Court of last resort in Michigan on matters involving attorney Grievances. On April 16, 2010, the Application for Leave to Appeal was denied by the Michigan Supreme Court "there being no majority in favor of granting leave to appeal". (See Pet. App. 13a). Specifically, Justices Weaver, Corrigan and Markman, decided that they would grant the Application for Leave to Appeal while Justices, Hathaway, Cavanagh and Chief Justice Kelly, would deny the Application. (See Pet. App. 12a).

Justice Robert Young did not participate in the decision initially stating, it was because:

"he was general counsel for AAA when a portion of the underlying litigation was pending". (See Pet. App. 38a).

Subsequently, on April 29, 2010, the individual Complainants filed a Motion with the Michigan Supreme Court that included Reconsideration of Justice Young's Decision Not To Participate[1].

On May 7, 2010, Justice Young admitted he had "no basis for his disqualification" but he nevertheless, continued his refusal to participate in these proceedings as he considered it **politically** risky and wrote that he was following the "safest course under the new amorphous disqualification rule by voluntarily declining to participate in order to avoid a **strategic or politically** motivated motion to disqualify me, followed by the second guessing of my colleagues". (See Pet. App. 11a).

Pursuant to the procedures established at Michigan Rules of Court 2.003, on June 24, 2010, the individual Complainants filed a Motion for Reconsideration by

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[1] Shortly before filing the Motion for Reconsideration, counsel for the individual Complainants discovered that during the 2004 re-election campaign of Chief Justice Marilyn Kelly, Respondent, Appellee, donated $3,400.00 to the Chief Justice's campaign, the maximum allowed by law. Respondent-Appellee, Sheldon L. Miller, was one of only eight individuals that gave the full $3,400.00 donation out of the over 2,200 individual donations to Chief Justice Kelly's campaign. Included with Petitioners' Motion for Reconsideration was a Motion that Chief Justice Kelly recuse herself from the proceedings before the Michigan Supreme Court. On June 11, 2010, Chief Justice Kelly denied Complainants' Motion to Disqualify on grounds that there is "no appearance of impropriety". (See Pet. App. 3a).

the Entire Court. On September 29, 2010, Complainants' Motion was denied. (See Pet. App. 1a).

In this Writ of Certiorari, Petitioners submit that although Justice Young's motivation was apparently to avoid inappropriate political attack upon him, his voluntary declination to participate in circumstances wherein he would be the deciding vote infringed upon Petitioners' due process of law in violation of the Fourteenth Amendment to the United States Constitution. As previously quoted, Justice Young acknowledged that there existed no basis for his disqualification and his "tenuous" connection to the underlying case had "no relevance" to the matter pending, yet he nevertheless, voluntarily decided not to participate in the proceedings before the Michigan Supreme Court. (See Pet. App. 10a). Justice Young failed to state any legally controlling or authoritative law of any kind as to why he should not participate in these proceedings, but instead, noted that he did so for "political" reasons and to avoid the "second guessing" of his colleagues. (See Pet. App. 11a). As Justice Young correctly pointed out, "[his] nonparticipation has resulted in an evenly divided court such that the propriety of the decision reached below cannot be decided by this State's senior court". (See Pet. App. 11a). As such, Justice Young's decision violated Petitioners' due process rights.

ARGUMENT FOR GRANTING THE WRIT OF CERTIORARI

Petitioners request that Justice Young be required to participate in the proceedings before the Michigan Supreme Court.

The current version of Michigan Court Rule 2.003 provides in relevant part as follows (See Pet. App. 111a):

> (C)(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
>
> (a) The judge is biased or prejudiced for or against a party or attorney.
>
> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in Caperton v. Massey, ___ U.S. ___; 129 S.Ct. 2252; 173 L.Ed. .2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

As explained by the Michigan Supreme Court in Pellegrino v. AMPCO Systems Parking, 485 Mich. 1134 (2010), MCR 2.003 is designed and intended to enhance the integrity of the judiciary and a state has a "compelling interest in preserving the public's confidence in the integrity and impartiality of its judiciary". (See Pet. App. 61a). It appears indisputable that no possible interpretation of MCR 2.003 or expansive reading of Pellegrino, could legitimately support the disqualification of Justice Young in the instant matter.

I. IT WAS A VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION (DUE PROCESS OF LAW) FOR JUSTICE YOUNG NOT TO PARTICIPATE IN THE PROCEEDINGS BEFORE THE MICHIGAN SUPREME COURT WHEN HE ACKNOWLEDGED THERE WAS NO BASIS FOR HIS DISQUALIFICATION AND HIS "TENUOUS" CONNECTION TO THE UNDERLYING CASE HAD "NO RELEVANCE" TO THE MATTER PENDING.

There is a well recognized doctrine known as the "duty to sit". In short, a Justice in the Court of last resort in a State has an affirmative duty to participate to the extent possible in matters before that Court. As explained by former Chief Justice William Rehnquist:

> "particularly on the supreme court of a state, a body in which judges who recuse themselves cannot be replaced, it is necessary that judges participate in cases in which recusal is not required". Laird v. Tatum, 409 U.S. 824, 837; (1972).

The duty to sit has been acknowledged by the Michigan Supreme Court as well, "... a justice has an affirmative **duty to participate to the extent possible in matters that are brought before this Court**". (See Pet. App. 63a).

The subject Grievance resulted out of Miller's alleged misconduct in representing his clients in the underlying Dumas v. AAA case. The Complaint and allegations of misconduct filed by the Grievance Administrator and the unanimous decision and

Reprimand by the hearing panel, all focused on Respondent-Appellee's representation and misconduct toward certain of his clients in the Dumas case. (See Pet. App. 39a). While Justice Young may have at one time served as general counsel for AAA when a portion of the Dumas case was pending, the service he performed in that position would have been entirely distinct from Miller's treatment of his clients, which is the subject matter of these proceedings. As General Counsel for the Auto Club, Justice Young would not possess any unique perspective or information relative to the communications dealing with the overall relationship between Miller and his clients. Justice Young has confirmed as much in his statement recusing himself saying:

> "As Appellants also accurately note, I certainly had no knowledge of any counsel/client relationship issues that comprise the actual subject matter before the Court today – the grievance filed against Mr. Miller by his former clients. Most significant, AAA is not a party to this grievance, which is the only matter before this Court. Therefore, even my tenuous connection to the Dumas case has no relevance to the matter pending here". (See Pet. App. 10a).

Therefore, in these circumstances where nothing in Justice Young's history was in any way or at anytime involved in the conduct of Mr. Miller toward his clients, it is inconceivable how any impropriety, or even appearance thereof, could be present in Justice Young's participation in this matter.

Here, there is no "appearance of impropriety", as required by MCR 2.003, resulting from Justice Young's former employment as general counsel for the Auto Club. (See Pet. App. 11a). No one has ever even suggested that there was. Very simply, the only reasons Justice Young decided not to participate in these proceedings were, as he truthfully acknowledged, for political reasons and in an effort to avoid the "second guessing" of his colleagues, neither of which are grounds for recusal under MCR 2.003 nor any other relevant law. (See Pet. App. 11a).

Justice Young's decision not to participate in these proceedings was critical because it resulted in an equally divided Court (Three Justices in favor of Granting Leave and Three Justices Opposed to Granting Leave), the resulting effect of which was that there was "no majority" of the Court that voted in favor of granting Leave. (See Pet. App. 12a).

In a State where the Justices of the Supreme Court are elected by the populous of the State, Justice Young's actions had the effect of nullifying the electoral choice and their right to choose which Justices shall participate in the case.

To place the Petitioners on the losing end of political strife between the Justices of the Michigan Supreme Court is not only unfair, but an obvious deprivation to their due process rights as protected by the United States Constitution. Such an outcome should not be permitted by this Court.

CONCLUSION

Based on all of the above, Petitioners respectfully request that this Honorable Court grant their Writ of Certiorari.

Respectfully Submitted,

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DATED: December 23, 2010

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APPENDIX A

Order
140081(9)

Michigan Supreme Court
Lansing, Michigan

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway
Alton Thomas Davis,
Justices

SC: 140081
ADB: 06-186-GA

[Filed September 29, 2010]

GRIEVANCE ADMINISTRATOR,
Petitioner-Appellee,

v

SHELDON L. MILLER,
Respondent-Appellee.

WAYNE ALARIE and RICHARD MARTIN,
Complainants-Appellants.

On order of the Court, the complainants' motion for full-Court consideration of the motion for recusal of the Chief Justice is considered, and the complainants' motion to recuse Chief Justice Kelly is DENIED, because the campaign contribution was within the lawful limits set by the Legislature.

CORRIGAN, J., not participating. I decline to participate in the resolution of this motion for recusal directed at the Chief Justice on the basis of my previously stated objections to the new disqualification rule.

YOUNG, J., not participating. I have voluntarily recused myself from participation in this case because I was general counsel for AAA when a portion of the underlying litigation was pending. Moreover, consistent with my previously stated objections to this Court's new disqualification rule,[1] I otherwise decline to participate in the resolution of any disqualification motion addressed to a Justice other than me.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

d0922

September 29, 2010 /s/ Corbin R. Davis
Clerk

[1] See 485 Mich civ, cxxxii (2009) (YOUNG, J., dissenting); *Pellegrino v Ampco Systems Parking*, 485 Mich 1134 (2010) (YOUNG, J., not participating).

APPENDIX B

STATE OF MICHIGAN
SUPREME COURT

SC: 140081
ADB: 06-186-GA

[Filed June 11, 2010]

GRIEVANCE ADMINISTRATOR,
Petitioner-Appellee,

v

SHELDON L. MILLER,
Respondent-Appellee.

WAYNE ALARIE and RICHARD MARTIN,
Complainants-Appellants.

KELLY, C.J. I deny appellants' motion for my recusal. The motion was not timely filed under MCR 2.003(D)(1)(c). Moreover, no objective appearance of impropriety arises from respondent Sheldon Miller's lawful contribution to my 2004 reelection campaign committee.

Appellants filed their motion for my recusal on April 29, 2010. On that date, MCR 2.003(D)(1)(c), as amended on March 16, 2010, was in effect. That rule provides: If an appellant is aware of grounds for disqualification of a justice, the appellant must file a motion to disqualify with the application for leave to appeal. All other motions must be filed within 28 days after the filing of the application for leave to appeal or within 28 days of the discovery of the grounds for disqualification.[1]

Appellants cannot be expected to have known on November 30, 2009, when they filed their application for leave to appeal with the Court, that MCR 2.003 would be amended as it was on March 16, 2010. Therefore, I would not expect that their motion for my recusal would have been filed accompanying their application. However, appellants should have filed their motion, at the latest, 28 days after the court rule was amended. They did not.

Furthermore, appellants assert that they only "recently discovered" the 2004 campaign contribution that they allege as grounds for my recusal.[2] However, campaign contribution records were available to the public and included the contribution in question years before appellants filed their motion. This fact renders irrelevant their allegation that they learned about it recently. They were given notice of it long before the instant case was filed. Thus, because appellants' motion was not filed in accordance with MCR

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[1] MCR 2.003(D)(1)(c).

[2] Appellants' motion for recusal, p 3, ¶ 8.

2.003(D)(1)(c) after it became effective, the motion was untimely.[3]

Even assuming, arguendo, that appellants' motion for my recusal had been timely filed, I would still deny the motion because I am not biased for or against any party or counsel involved in this action. And, addressing the grounds appellants have raised, no objective appearance of impropriety exists. Appellants allege as the sole grounds for my recusal that respondent contributed $3,400.00 to my 2004 reelection campaign committee. That contribution is insufficient to create an objective appearance of impropriety for several reasons.

First, respondent's contribution was lawful. A lawful campaign committee contribution, absent more, does not warrant recusal under our objective standard for the appearance of impropriety.[4] Indeed, such

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[3] Even if appellants had filed their motion under the rule governing disqualification motions for trial level judges, it still would have been untimely. Under the version of MCR 2.003(C)(1) in effect at the time appellants filed their application, a motion to disqualify had to be filed within 14 days after the moving party discovers the ground for disqualification. Yet the Michigan Department of State, Bureau of Elections posted listings showing respondent's contribution, as well as those of all other donors, in 2004. See Justice Kelly's Itemized Contributions Schedule 1A, p 76 ("Pre-Convention CS(c)"), filed August 16, 2004, available at http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=508277 (accessed June 10, 2010).

[4] Appellants cite the recommendations of the ABA Task Force on Lawyer's Political Contributions as a basis for my recusal. Appellants' motion for recusal, p 3 ¶ 9. The findings of the ABA task force recommend that a judge disqualify himself or herself

contributions are commonplace in judicial campaigns. The Michigan Campaign Finance Act's[5] campaign contribution disclosure provisions reflect the Legislature's understanding that, standing alone, lawful contributions to campaign committees in the permitted amounts will not undermine the public's confidence in our judiciary. The contribution alone does not indicate any closer relationship between myself and respondent than would ordinarily exist between members of the same bar association.[6] In fact, appellants have not suggested that there exist any facts, aside from the contribution, that could cause my impartiality in this case to be questioned. And *none does* exist.

Second, respondent's single contribution of $3,400.00 represents a de minimis amount of the total raised by my campaign committee in 2004: less than

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when "a lawyer . . . or a party to litigation . . . has made a campaign contribution in excess of a jurisdiction's limits . . . ." Appellants ignore the phrase "in excess of a jurisdiction's limits." Here, there is no dispute that respondent's contribution was lawful and within Michigan's campaign contribution limits. Thus, the task force's recommendation has no bearing on this case.

[5] MCL 169.201 et seq.

[6] See, e.g., *Frade v Costa*, 342 Mass 5, 8 (1961).

one-half of one percent.[7] This small amount does not create an objective appearance of impropriety.

In *Caperton v A T Massey Coal Co, Inc*,[8] the U.S. Supreme Court ruled on a West Virginia Supreme Court justice's refusal to recuse himself. The CEO of a lead defendant in a case before the West Virginia Supreme Court had contributed $3.5 million to the justice's campaign. The refusal to recuse was held to constitute a violation of the due process clause of the Fourteenth Amendment. However, given the obvious difference in size between the contribution at issue in *Caperton* and respondent's contribution here, one could not reasonably analogize the two cases.

Thus, respondent's contribution, absent any indicia of an appearance of impropriety, does not mandate my recusal, and the *Caperton* decision does not require it, either. In any event, appellants do not argue that *Caperton* mandates my recusal. Nor do they allege that respondent's campaign contribution and my participation in this case amount to a due process violation.

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[7] The Committee to reelect Supreme Court Justice Marilyn Kelly raised $728,800.45 from over 2,200 individual contributions. $3,400.00/$728,800.45 = .004665, or .4665%. See Justice Kelly's Dissolution of Candidate Committee Statement ("Post-General CS Diss(e)"), filed December 12, 2004, available at <http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=508277> (accessed June 10, 2010).

[8] *Caperton v A T Massey Coal Co, Inc*, ___ US ___, 129 S Ct 2252, 173 L Ed 2d 1208 (2009).

In sum, appellants' motion for my recusal was untimely under MCR 2.003(D)(1)(c). Furthermore, there exists no objective appearance of impropriety based solely on the fact that respondent lawfully contributed to my 2004 reelection campaign committee. Accordingly, I deny appellants' motion for my recusal.

APPENDIX C

STATE OF MICHIGAN
SUPREME COURT

SC: 140081
ADB: 06-186-GA

[Filed May 7, 2010]

GRIEVANCE ADMINISTRATOR,
Petitioner-Appellee,

v

SHELDON L. MILLER,
Respondent-Appellee.

WAYNE ALARIE and RICHARD MARTIN,
Complainants-Appellants.

Justice YOUNG, Statement *Denying* Appellants' Motion to Participate:

I harbor no bias for or against any of the parties in this grievance matter. Moreover, as the Appellants correctly note, I had no direct contact with the *Dumas v AAA* case which led to the grievance matter that is

now before this Court. My *only* (and attenuated) connection was that during my tenure as General Counsel of AAA Michigan, the *Dumas* case was pending: I was not counsel of record in *Dumas*, and AAA retained outside counsel who were, in turn, supervised by lawyers on my staff.

Obviously, as General Counsel, I was kept apprised of the progress of all litigation in which the company was involved. However, as Appellants also accurately note, I certainly had no knowledge of any counsel/client relationship issues that comprise the actual subject matter before the Court today – the grievance filed against Mr. Miller by his former clients. ***Most significant, AAA is not a party to this grievance*, which is the only matter before this Court. Therefore, even my tenuous connection to the *Dumas* case has no relevance to the matter pending here.**

In a rational world where the legitimate concern is that only judges who can impartially hear cases participate in them, the recited facts would not lead to a decision to recuse. However, last November, a majority of my colleagues created a different world – one in which it is impossible to determine in advance what standards apply to disqualification decisions – where a clear rule was replaced by a vague one. As I said at the time our new disqualification rule was adopted, the majority was weaponizing the disqualification process by inserting the "appearance of impropriety" as a controlling standard of disqualification. Moreover, now such a determination is made post hoc by a majority of this Court.

I believe that no basis exists for my disqualification in this case, but I chose the safest course under the new amorphous disqualification rule by voluntarily declining to participate in order to avoid a strategic or politically motivated motion to disqualify me, followed by the second guessing of my colleagues. Unfortunately, this is a direct product of the new "ethical" order established by Chief Justice Kelly and Justices Cavanagh, Weaver, and Hathaway.

Accordingly, because no one can now predict what will constitute an "appearance of impropriety" in the minds of my colleagues, I decline Appellants' request that I participate. I do so with extreme reluctance because my nonparticipation has resulted in an evenly divided court such that the propriety of the decision reached below cannot be decided by this State's senior court.

APPENDIX D

Order
140079
140081

Michigan Supreme Court
Lansing, Michigan

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

[Filed April 16, 2010]

SC: 140079
ADB: 06-186-GA

GRIEVANCE ADMINISTRATOR,
Petitioner-Appellant,

v

SHELDON L. MILLER,
Respondent-Appellee.

SC: 140081
ADB: 06-186-GA

GRIEVANCE ADMINISTRATOR,
Petitioner-Appellee,

v

SHELDON L. MILLER,
Respondent-Appellee.

WAYNE ALARIE and RICHARD MARTIN,
Complainants-Appellants.

On order of the Court, the applications for leave to appeal the October 30, 2009 order of the Attorney Discipline Board are considered, and they are DENIED, there being no majority in favor of granting leave to appeal.

WEAVER, J., would grant the applications for leave to appeal.

CORRIGAN, J. (*dissenting*).

I dissent from this Court's denial of leave to appeal the order of the Attorney Discipline Board (ADB) vacating the hearing panel's order of reprimand. The hearing panel determined that respondent Sheldon L. Miller violated MRPC 1.4(b) by failing to inform complainants, his clients, who primarily asserted that they had been wrongfully discharged, that the trial court had recently dismissed one of the plaintiffs' claims, a ruling that was adverse to the clients' interests. Despite the three-member panel's

unanimous determination[1] that Miller's conduct warrants disciplinary action and the Grievance Administrator's persuasive argument that Miller committed serious misconduct, this Court cannot muster a majority in favor of reviewing the ADB's decision to vacate the panel's order of reprimand. In so doing, this Court allows Miller's major ethical failures to escape punishment. Because serious misconduct apparently occurred, I would grant the applications for leave to appeal.

I. INTRODUCTION

During the 1980s, Miller represented numerous individual plaintiffs in a lawsuit against Auto Club Insurance Association (AAA). The plaintiffs included both current and former AAA employees. The lawsuit included a claim on behalf of all plaintiffs that AAA improperly changed the method of compensation from a seven percent commission system to a unit-based system. It also asserted wrongful discharge on behalf of some former employees. Miller filed several amended complaints, each adding additional plaintiffs, until the total reached 150-200 plaintiffs. The Grievance Administrator's complaint against Miller alleged misconduct in Miller's representation of the complainants, Richard Martin (now deceased), Wayne Alarie, Donald Durecki, and James Dziadziola, who were part of a smaller group of former employees. The complaint alleged that Miller failed to inform complainants of an adverse ruling just before they joined the lawsuit, agreed to stay the wrongful

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[1] The panel consisted of attorneys Samuel I. Bernstein, Thomas C. Simpson, and David F. Zuppke.

discharge claims without their knowledge, and essentially prioritized the seven percent compensation claim while continuously failing to provide the complainants with sufficient information to allow them to make informed decisions about the representation. The complaint alleged that this conduct violated several provisions of the Michigan Rules of Professional Responsibility.

This Court does complainants, the hearing panel, and the public a major disservice by failing to review this matter further and allowing Miller to escape without any sanction. The record reveals that Miller failed to inform the complainants of the earlier adverse ruling because he believed it was not important to do so. Miller unquestionably prioritized the seven percent commission claim over the wrongful discharge claim. Complainants maintain that Miller knew that they were more concerned about pursuing their wrongful discharge claims. Complainants believed for years that Miller was pursuing their wrongful discharge claims when those claims had been stayed. Miller gave inconsistent answers in response to his clients' repeated requests for information about the lawsuit. Indeed, Miller apparently forgot that the lawsuit ever included wrongful discharge claims. After listening to hours of testimony and posing questions to the witnesses, the hearing panel concluded that Miller's conduct warranted a reprimand.

The ADB's decision to vacate the panel's order of reprimand is highly questionable because an attorney's duty to communicate with clients clearly existed before MRPC 1.4(b) was enacted in 1988. In dismissing on this ground, the ADB erroneously relied on criminal

procedure standards instead of notice standards governing civil cases.

Moreover, the record warrants this Court's plenary consideration of the Grievance Administrator's allegations that Miller's post-1988 conduct violated MRPC 1.4(b) and additional provisions of the Michigan Rules of Professional Responsibility.

II. THE UNDERLYING LAWSUIT AND THE MALPRACTICE ACTIONS

Miller filed the initial complaint in *Dumas et al v Auto Club Ins Ass'n*, Wayne Circuit Court No. 83-316603-CK[2] in 1983 with three plaintiffs: Richard

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[2] The lengthy procedural history of the underlying *Dumas* case is set forth in detail in *Dumas v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2000 (Docket No. 208617). In the recent case of *Dumas v Miller*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2010 (Docket Nos. 279149, 286342, 286343, 286344, 287143), the Court of Appeals resolved the only remaining issue in the *Dumas* case: a fee dispute between Miller and attorney Theodore S. Andris, who later substituted for Miller in representing some of the plaintiffs. The Court of Appeals also addressed several consolidated legal malpractice actions arising out of Miller's representation of current and former AAA employees. It affirmed the trial court's grant of summary disposition in favor of defendants (Miller, his law firm and in Docket No. 286344 David Ravid, Miller's former associate) in Docket Nos. 286343, 286344, and 286342, and reversed the trial court's denial of defendants' motion for summary disposition in Docket No. 287143.

Docket No. 279149 concerns essentially the same allegations of misconduct that were presented to the ADB. The Court of Appeals relied in part on the decision of the ADB in concluding

Dumas, Lynn McBride, and Eugene Pasko. The complaint included several counts including breach of contract and violation of the Elliot Larsen Civil Rights Act. Plaintiffs alleged that AAA breached its employment contract with the plaintiffs by changing the system of compensation, including replacing the previous guarantee of a seven percent commission for renewal policies, and instituting new minimum production standards ("quotas") for new policies. The Elliot Larsen claim alleged that the change in the compensation system had a disparate impact on older employees and was intentionally designed to force older employees to terminate their employment with AAA, accept employment with AAA at a lower salary, "or become discharged," and that the plaintiffs "actually were either discharged, terminated their own employments, or accepted employment with [AAA] at their lower yearly salary." Most of the plaintiffs were still employed by AAA and were pursuing claims related to the compensation system. A smaller group of plaintiffs, including complainants, were no longer employed by AAA. These plaintiffs were also claiming wrongful discharge. Although Miller initially contemplated a class action, the action was not certified. Instead, individual plaintiffs were added by several amended complaints. According to testimony before the panel, Miller eventually represented as many as 150 to 200 plaintiffs.

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that the trial court did not err in finding, after conducting an evidentiary hearing, that Miller did not engage in disciplinable misconduct with respect to his representation of the *Dumas* plaintiffs.

In January 1984, before the complainants joined the lawsuit, Wayne Circuit Judge John Hausner dismissed a portion of the complaint pertaining to the breach of contract claims. Neither Miller nor his associates told complainants about this partial dismissal before they joined the lawsuit.

In 1985, Miller and his associates and the attorneys for AAA agreed to proceed with the seven percent commission claims and to stay the issues relating to production standards, which included the wrongful discharge claims. On May 8, 1985, the court entered an "Order Regarding Plaintiffs' Motion to Establish Manageable Parameters for Complex Litigation," which bifurcated any trial on the issues of liability and damages for the claims pertaining to the changes in the commission system, including claims for breach of contract and unjust enrichment under *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579 (1980), and stayed "in their entirety" plaintiffs' claims regarding the quota production standards, which included claims of age discrimination and wrongful discharge.

Complainants claim that they were never informed about the stay of proceedings. Although proceedings including several appeals to the Court of Appeals and this Court continued in the *Dumas* case over the next several years, the wrongful discharge claims remained subject to the stay.

In 1986, the trial court granted AAA's motion for summary disposition and dismissed the seven percent commission issue from the lawsuit. The order was designated as a "final" order even though it did not dispose of the wrongful discharge claims and the case

was removed from the circuit court's docket. Appeals followed. During this time, the complainants believed their wrongful discharge claims were pending and sought information from Miller on several occasions. In 1988, Miller won partial reversal of the trial court's summary disposition order in the Court of Appeals, *Dumas v Auto Club Ins Ass'n*, 168 Mich App 619 (1988), but in *Dumas v Auto Club Ins Ass'n*, 437 Mich 521 (1991), this Court reversed the Court of Appeals decision that plaintiffs could maintain their action for breach of contract and unjust enrichment against AAA. In November 1991, Miller held a meeting to inform his clients of this Court's decision.

After some of Miller's clients retained attorneys to file legal malpractice actions against Miller, Miller began seeking to have *Dumas* reinstated for the clients who were claiming wrongful discharge because it did not appear that this Court's 1991 decision specifically addressed that claim. Then, in a 1993 discovery deposition of one of Miller's former associates, the 1985 stay came to light. The stay thereafter became the basis of Miller's efforts to reinstate the wrongful discharge claim.

In 1991, Martin and Alarie retained attorney Theodore S. Andris to explore the possibility of suing Miller for legal malpractice. Miller offered to allow Andris to substitute as attorney for Martin and Alarie. Andris declined. He wanted Miller to first succeed in having his clients' wrongful discharge claims reinstated. Miller apparently contended that the claims of Martin and Alarie had no merit and that any malpractice claim against him would be frivolous. In 1992, Andris filed a malpractice action against Miller on behalf of Martin and Alarie. Attorney John Mason

filed a malpractice action against Miller on Durecki's behalf.

In October 1992, Andris filed a limited appearance in the *Dumas* lawsuit for the purpose of determining the status of the case. Attorney Roger Wardle, Miller's attorney in the malpractice action, concurred in the motion. Judge Hauser initially determined that all of the issues in the case had been resolved, and ruled on remand that although the 1986 order granting summary disposition did not dispose of the plaintiffs' "'quota' age discrimination claims," plaintiffs had abandoned those claims.

In 1996, the *Dumas* case was reassigned to Wayne Circuit Judge William Giovan, who handled further trial court proceedings on whether to grant a scheduling order for proceedings on the quota age discrimination claim or enter an order disposing of the case. Judge Giovan concluded that no court or person intended for the case to be dismissed, and granted the motion for entry of a scheduling order on April 25, 1996. The order noted that the court's ruling "also necessarily contemplates that the stay of proceedings entered . . . on May 8, 1985, is hereby dissolved." More appeals ensued, but Judge Giovan's decision to allow the wrongful discharge claims to proceed was ultimately upheld.

Miller's representation of Martin and Alarie in the *Dumas* case continued until Andris entered a substitution of counsel on their behalf in 2002. AAA settled with Martin and Alarie for $300,000 each. Attorney John Mason took over representation of some of the other *Dumas* plaintiffs, including complainant Durecki. Mason took his clients' claims to trial and, in

2002, a jury returned a verdict of no-cause of action. Several of the original plaintiffs, including complainant Dziadziola, continued to be represented by Miller. Dziadziola ultimately accepted AAA's offer to settle for $30,000. In 2004, Andris filed a malpractice action against Miller on behalf of Dziadziola and three other plaintiffs who accepted similar settlement offers. As noted, the Court of Appeals recently addressed the consolidated malpractice actions. *Dumas v Miller*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2010 (Docket Nos. 279149, 286342, 286343, 286344, 287143).

III. PROCEEDINGS BEFORE TRI-COUNTY HEARING PANEL #64

Complainants also sought disciplinary action against Miller. In 2006, the Grievance Administrator filed a complaint before the Attorney Discipline Board alleging that Miller's agreement to stay the wrongful discharge claims while proceeding with the claims related to the compensation system effectively prioritized the claims of the plaintiffs who were still employed by AAA without the knowledge of the plaintiffs who had been discharged. The complaint alleged that Miller failed to obtain authority or approval from complainants to stay their wrongful discharge claim and failed to inform them of the stay. It alleged that in response to complainants' repeated inquiries about the status of the case, Miller misrepresented to them that their claims were on appeal, even though the wrongful discharge claim had been stayed. The Grievance Administrator alleged violations of several sections of the Michigan Rules of Professional Conduct.

The panel held a three-day hearing on June 25, 2007, November 6, 2007, and March 5, 2008, and issued its report on April 8, 2008. The panel unanimously found that that the Grievance Administrator had proven by a preponderance of the evidence that Miller had failed to explain a matter to the extent reasonably necessary to permit his clients to make informed decisions in violation of MRPC 1.4(b). In particular, the panel found that Miller was obligated to explain to complainants the implications of joining the "large group" action instead of initiating independent actions. It also found that, by failing to inform complainants of the adverse ruling that occurred just before they joined the lawsuit, Miller deprived them "of the opportunity to file an independent action which likely would have been assigned to a different Judge where a different ruling of the dismissed legal issues might have occurred." The panel concluded that the Grievance Administrator had not proven by a preponderance of the evidence that Miller violated other sections of the MRPCs. The panel thereafter unanimously concluded that Miller should be reprimanded and issued an order of reprimand.

IV. THE ATTORNEY DISCIPLINE BOARD'S RULING

Complainants appealed to the ADB. The ADB granted Miller's motion to consider his delayed cross-petition for review. In his cross-petition, Miller argued for the first time that MRPC 1.4(b) did not come into effect until 1988 and that the Grievance Administrator had not pleaded a violation of the Code of Professional Responsibility which was in effect in 1984 and 1985. After a hearing, the ADB issued an order on October 30, 2009 vacating the panel's order of reprimand. The

ADB affirmed the panel's findings of fact, but vacated the order of reprimand. It reasoned that Miller's conduct during the relevant period 1984 through 1985 was not in violation of MRPC 1.4(b) as alleged in the complaint because MRPC 1.4(b) did not become effective until October 1, 1988 and the complaint did not charge any violation under Michigan's former Code of Professional Responsibility.

V. AN ATTORNEY'S DUTY TO COMMUNICATE WITH CLIENTS

I would grant complainants and the Grievance Administrator leave to appeal the ADB's decision. An attorney's duty to communicate with clients plainly existed before MRPC 1.4(b) was enacted. "[T]he failure to disclose all relevant facts and information known by an attorney to his or her client has traditionally been regarded as breach of an attorney's ethical obligation." *State Bar Grievance Administrator v Estes*, 390 Mich 585, 600 (1973), citing *Kukla v Perry*, 361 Mich 311, 317 (1960); *Storm v Eldridge*, 336 Mich 424, 435 (1953). In *Joos v Auto Owners Ins Co*, 94 Mich App 419, 424 (1979), the Court of Appeals held that "an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle." Moreover, the duty of reasonable communication imposed by MRPC 1.4(b) was embodied in the Michigan Code of Professional Responsibility. DR 6-101(A)(3) provided that "[a] lawyer shall not . . . [n]eglect a legal matter entrusted to him." DR 7-101(A)(2) and (3) provided that "[a] lawyer shall not intentionally . . . [f]ail to carry out a contract of employment entered into with a client for professional services . . ." or "[p]rejudice or damage his client during the course of the professional relationship . . ."

VI. SUFFICIENCY OF THE COMPLAINT

Moreover, the complaint contained sufficient factual details to notify Miller of the nature of the allegations against him. While Miller likens a proceeding before the ADB to a criminal proceeding, the Grievance Administrator points out that, in general, "the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel." MCR 9.115(A). "Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100." *Id.* Under the general rules of pleading in a civil action, a pleading must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend" and "[a] demand for judgment for the relief that the pleader seeks." MCR 2.111(B)(1), (2). The purpose of a complaint in a civil action is to state a cause of action and to allege facts with "'sufficient particularity to reasonably inform the defendant of the nature of the cause of action.'" *Steed v Covey*, 355 Mich. 504, 510 (1959), quoting 19 Michigan Law and Practice, Pleading § 8, p12. "'In general, the complaint or petition is sufficient if its allegations state facts upon which the plaintiff relies for a recovery, and if it adequately advises the defendant of the charge so as to enable him to prepare his defense.'" *Id.* at 511, quoting 41 Am Jur, Pleading, § 77, pp 343-345.

Moreover, MCR 9.115(B), which applies specifically to disciplinary proceedings further provides that,

"Except as provided by MCR 9.120,[3] a complaint setting forth the *facts* of the alleged misconduct begins proceedings before a hearing panel." (Emphasis added.) In contrast, the rules of criminal procedure define the complaint as "a written accusation that a named or described person has committed *a specified criminal offense*" and require the complaint to "include the substance of the accusation against the accused and *the name and statutory citation of the offense*." MCR 6.101(A). And, unlike in a criminal case, "[a] default, with the same effect as a default in a civil action, may enter against a respondent [in a disciplinary proceeding] who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so." MCR 9.115(D)(2).

Because the rules of civil procedure apply to pleadings in a disciplinary action, and because the complaint thoroughly set forth the facts of the alleged misconduct, I believe we should grant leave to consider the correctness of the ADB's decision to vacate the panel's reprimand order on the sole basis of the Grievance Administrator's failure to plead a violation of the former Michigan Code of Professional Responsibility.

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[3] MCR 9.120 applies when the attorney has been convicted of a criminal offense. It requires, among other things, that the Grievance Administrator be notified of the conviction within 14 days.

VII. ADDITIONAL ALLEGED VIOLATIONS OF THE MICHIGAN RULES OF PROFESSIONAL RESPONSIBILITY

In addition to disputing the correctness of the ADB's decision because an attorney's duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation predated the enactment of MRPC 1.4(b) in 1988, the Grievance Administrator points out that Miller's duty to keep his clients informed continued until at least 1991, and until 2002 with respect to Dziadziola. I believe the record, as discussed below, supports the Grievance Administrator's position. In addition, the Grievance Administrator argues that the record supports additional findings of misconduct. Specifically, the Grievance Administrator alleges that Miller handled a legal matter that he was not competent to handle in violation of MRPC 1.1(a); neglected a legal matter entrusted to him in violation of MRPC 1.1(c); failed to seek the complainants' lawful objectives in violation of MRPC 1.2(a); limited the objectives of the representation without complainants' consent in violation of MRPC 1.2.(b); failed to act with reasonable diligence in violation of MRPC 1.3; failed to make reasonable efforts to expedite litigation in violation of MRPC 3.2; failed to keep complainants reasonably informed about the status of the matter and to promptly comply with reasonable requests for information in violation of MRPC 1.4(a); materially limited his representation of complainants by also representing the larger group of plaintiffs in violation of MRPC 1.7(b); and engaged in misrepresentation in violation of MCPC 8.4(b) by repeatedly misrepresenting to Martin and Alarie that they did not have wrongful discharge claims. The Grievance

Administrator also claims that this alleged misrepresentation was conduct that exposed the legal profession to obloquy, contempt, censure, or reproach in violation of MCR 9.104(A)(2), and was conduct that was contrary to justice, ethics, or honesty in violation of MCR 9.104(A)(3).

VIII. RECORD SUPPORT FOR THE ALLEGATIONS OF MISCONDUCT

In my view, the record supports the Grievance Administrator's and the complainants' argument that significant misconduct occurred. Miller's apparent failures began at the time complainants decided to retain Miller with his failure to inform them of the earlier adverse ruling and to explain to them the implications of joining a larger group of plaintiffs who were still employed by AAA. Miller admitted that when the complainants first approached him in 1984, the breach of contract claims for both minimum production standards and the change in compensation had been dismissed. Transcript of Panel Hearing, March 5, 2008, at 691. Miller testified that members of his staff probably first interviewed complainants but agreed that no one would have told them about the dismissal. Miller felt it was not important to tell them because the most important part of the case was the seven percent compensation issue and because he had a right to appeal the trial court's decision. *Id.* at 688, 695.

Miller's questionable conduct continued when he agreed to stay part of the case yet allegedly failed to inform complainants of the stay at the time it was entered. Miller apparently agreed to the stay for strategic reasons. He believed that resolution of the

seven percent claims first would benefit even those plaintiffs who no longer worked at AAA. Complainants, however, maintained that they made it clear to Miller that their priority was the wrongful discharge claims. At the time the stay was entered and in the years that followed, Miller seemingly failed to appropriately communicate with the smaller group of plaintiffs who had been discharged, despite their repeated requests for information.

Miller testified before the panel that he and AAA's counsel had agreed that the case should be bifurcated and part of the case stayed. *Id.* at 726. AAA apparently refused to discuss settlement until the issue regarding the change in the compensation system had been resolved. *Id.* at 724. Miller testified that his rationale behind agreeing to the stay was that the seven percent issue should be pursued first because the most important issue for the plaintiffs who had lost their jobs was the amount of damages to which they would be entitled. *Id.* at 720. Miller believed that he would be able to get a larger amount in damages for both the plaintiffs who were still employed by AAA and those who had lost their jobs if he was able to prevail on the seven percent issue because AAA had cut pay by as much as 40 percent. *Id.* at 720-721. Miller's former associate David Ravid likewise testified that the attorneys for both sides agreed that the "biggest single issue and the only common issue" was the seven percent compensation claim, so they agreed to the stay in an effort to "streamline" the case. Transcript of Panel Hearing, November 6, 2007, at 533-534. Miller acknowledged at the hearing that, at the time he agreed to the stay, he had no information about the amount of the complainants' compensation under the old versus new compensation systems, so he did not

actually know how much greater their damages would have been if the seven percent compensation claim were proven. Transcript of Panel Hearing, March 5, 2008, at 731-732. Miller was also asked what he would have done if any of the plaintiffs who no longer worked at AAA approached him and indicated that they were more concerned about having lost their jobs and agreed to damages calculated using the new compensation system. *Id.* at 730. Miller replied, "If somebody came and told me that specifically and I was sure that they understood they would be putting in damages at a substantially lower level, absolutely, I would have done what they wanted." *Id.* at 730-731.

Yet according to the complainants, their primary concern, which they made clear to Miller and his staff, was pursuing the constructive discharge claims. Alarie testified that he and Martin met with Miller and Bill Stevenson of the Miller law firm. Transcript of Panel Hearing, June 25, 2007, at 62. Alarie said that he went to see Miller because he felt he had been forced out of AAA because of their practices. *Id.* at 62-63. Alarie testified, "once I presented my case to him, he said that I had a classic case of constructive discharge and that he would add us, add me to the case he already had, and that would expedite my case coming to light." *Id.* at 63. Alarie said that he understood that the *Dumas* case was about the seven percent commission claim and that he agreed that Miller could make that claim for him too "[i]f it was going to expedite our case." *Id.* at 65. Alarie testified that he reiterated to Miller that he was not currently employed with AAA. He believed Miller understood that his primary purpose in retaining Miller was to pursue a constructive discharge claim. *Id.* at 65-66. Dziadziola similarly testified that his primary concern, which he

communicated to Miller, was that he "had planned on staying with [AAA] all my career, and now it was taken away." *Id.* at 173. He said that Miller advised joining the lawsuit that was already underway. *Id.* at 171-174. Durecki testified that he retained Miller because Miller "agreed to represent me for what he told me was wrongful discharge due to age." *Id.* at 275. Durecki testified he wanted his job back and that Miller knew that because Durecki asked him about it at every meeting. *Id.* 283-284.

Given the complainants' apparent focus on their wrongful discharge claims, they should have been informed about the stay. Miller testified that while he had no recollection of informing his clients about the stay, he held a meeting with all of the clients after every major ruling, and that he was confident he held a meeting after the stay was entered. Transcript of Panel Hearing, March 5, 2008, at 727-728. It is undisputed that Miller and his associates held several meetings for all of the plaintiffs to inform them of developments in the lawsuit. Ravid also did not recall informing the plaintiffs of the stay, but was "quite confident" that they were told about the stay. Transcript of Panel Hearing, November 6, 2007, at 536-537. Miller acknowledged, however, that he did not write, telephone or meet separately with the clients most directly affected by the stay. Transcript of Panel Hearing, March 5, 2008, at 729-730. It is also not clear whether any provision was made for informing those clients who could not attend the meetings. Miller testified that "[a]s far as I could tell without taking attendance, I thought just about everybody attended every meeting," but acknowledged the possibility that some clients may have never attended a meeting. *Id.* at 882-883. Panelist Bernstein

then asked, "Can I ask you why you didn't every three or four or five or six months didn't just write a mass letter to everyone indicating what was transpiring?" *Id.* at 883. Miller responded:

> Most of the time nothing was going on. We did write letters when there were settlement proposals, which was of importance to them, "Please come in." Everyone came in personally, I discussed their case and the offer the AAA made to their case.
>
> Other than that, they got personal letters telling them to attend the meetings. I would assume that if they couldn't attend the meetings – maybe I'm wrong – if [sic] I could assume that if they don't attend the meeting and they want to know what's going on, they pick up the phone, okay? Nobody ever called me and said, "What's going on that I don't know, or anything like that. So as far as I knew, everybody was fully informed of everything. [*Id.*]

The complainants insisted that they never learned of the stay, either at the meetings or by other means. Transcript of Panel Hearing, June 25, 2007, at 73-76, 180-181, 183-185, 284, 290. Durecki testified that he attended every meeting about which he received a notice. *Id.* at 290-291. Durecki would sometimes ask Miller about the wrongful discharge claims at the large group meetings but that he never learned of the stay until sometime in the 1990s when attorney John Mason told him about it. *Id.* at 291. Fran Stocker, who was one of the Dumas plaintiffs still employed by AAA during the lawsuit, also testified that she attended

most of the meetings and did not recall any discussion of any part of the case being stayed. Transcript of Panel Hearing November 6, 2007 at 426-427.

Over several years, complainants requested information about the lawsuit. In a February 17, 1985 letter, Martin wrote to Miller that he had called Miller's office twice in November 1984 and left a message asking Miller to return his calls. Miller did not respond. Martin hoped for answers to his questions. Martin continued:

> In reading an article in the Grand Rapids paper about Bruce Farrell's lawsuit and his award, I find that you were quoted as saying that all of your clients are still employed at AAA. Mr. Miller, you have three clients in Bay City who are not employees of AAA. Are we not still part of your lawsuit?
>
> Could you please give me a brief synopsis of our suit as to where it stands presently? What does the award in Grand Rapids mean to our case? Are we still sometime from a trial? Has the company (AAA) offered any type of settlement? [Complainant's Amended Brief in Support of Petition for Review of Order of Tri-County Hearing Panel #64, Exhibit B.]

Attorney David Ravid apparently responded on Miller's behalf that the Farrell case had little meaning to the Dumas case but also stated that all plaintiffs named in the suit continued to be a part of the suit whether or not they were currently employed by AAA. Transcript of Panel Hearing, March 5, 2008, at 715.

On August 30, 1990, Martin wrote to Miller stating that he had previously declined to accept AAA's settlement offer. Martin stated that he had "no intention of accepting such a ridiculous amount." Martin wrote that Miller's reply to his earlier correspondence did not address his "concern as to why I would not receive a settlement based on the merits of the whole suit and not just the unit difference." Martin continued: Again, I ask if you have approached AAA for a settlement on the whole case? Can I file a suit individually or must I remain part of the Dumas case? What is the status of our case with the courts, including the Michigan Supreme Court?

> The reason for my concern is that there are individuals from this area that are with other attorneys that have reached settlement with AAA. [Complainants' Application, Exhibit CC, Petitioners' Exhibit 30.]

Miller's September 5, 1990 response acknowledged that Martin had a wrongful discharge claim. The letter stated that negotiations between Miller and AAA had "hit into a brick wall," but explained that they had previously attempted to agree on a damages formula. "However, in a case such as yours, where there is a claim for wrongful discharge, the formula would not be fair, as it would be applied to you." Miller explained that if they were able to prove wrongful discharge, "the amount of damage you would have suffered would be far, far greater than the amount AAA would be willing to pay voluntarily." Complainant's Amended Brief in Support of Petition for Review of Order of Tri-County Hearing Panel #64, Exhibit I.

An internal memorandum dated January 11, 1991 from attorney Richard Shaw to Miller responded to Miller's January 10, 1991 query whether the firm was pursuing a cause of action in connection with the discharge of several of the *Dumas* plaintiffs. Shaw wrote, "It is most unclear to me whether issues such as quotas, demotion, and discharge are still alive in the trial court. . . . If they are, we should be actively adjudicating those claims." Complainant's Amended Brief in Support of Petition for Review of Order of Tri-County Hearing Panel #64, Exhibit J. At the hearing, Miller admitted he did nothing in response to this memorandum, but said "I was in the Supreme Court. What could I do? . . . You can't just take away the case and bring it back." Miller testified that he knew the case was "still alive" on the wrongful discharge claims all along and knew that part of the case had not gone forward, but admitted that he may have forgotten about the actual stay order. Transcript of Panel Hearing, March 5, 2008, at 757-759.

In a January 30, 1991 letter signed by both, Martin and Alarie reiterated their rejection of AAA's settlement offer: "we reject any settlement of this nature based on the unit discrepancy and wish our settlement to be based on the merits of the whole case. We do not understand how the direction of our case has been narrowed to the point of unit pay." Martin and Alarie asked, "Why is AAA eager to settle for much larger amounts with other former employees?" Complainants' Application, Exhibit DD, Petitioners' Exhibit 33.

In a March 22, 1991 letter, Miller advised Martin and Alarie that "our lawsuit which was filed in 1983 did allege age discrimination and breach of the

employment contract as they pertained to the payment of 7% commissioners on new and renewal business. . . . That lawsuit does not contain any claim that anybody was wrongfully discharged." Complainant's Amended Brief in Support of Petition for Review of Order of Tri-County Hearing Panel #64, Exhibit K. At the hearing, Miller testified concerning this letter, "I made a mistake in my wording." Transcript of Panel Hearing March 5, 2008, at 755-756. He admitted that the mistake had never been corrected because he was not aware of it until later. *Id.* at 756. Referring to the plaintiffs, Miller said, "They had copies of the lawsuit, so they knew what the lawsuit said." *Id.*

In November 1991, Miller held a meeting to discuss this Court's 1991 decision reinstating Judge Hausner's summary disposition order. The dialogue at the meeting suggests that Miller had forgotten about the wrongful discharge claims or that he had at least failed to keep the plaintiffs informed about the status of those claims. At the meeting, a plaintiff identified only as "Pasko" asked Miller what happened to the age discrimination claims. Miller replied that age discrimination "didn't apply" in *Dumas*:

> MILLER: . . . It didn't apply because the discrimination was not for anybody losing their job. Had you been fired, had you been fired, and they replaced you with a younger person, that would have at least been a claim for age discrimination.
>
> PASCO: But that's exactly what happened.
>
> MILLER: Oh, wait, I'm not talk—I, no, wait . . . so we understand, I'm not talking about your

individual, I'm talking about the Dumas case that was filed as a 7% commission case.

PASKO: Because I'm one of the originals, and I was the, was one of the one's forced out for early retirement and you said you had me covered. And that's age discrimination. That's unlawful discharge, harassment, whatever you want to call it.

MILLER: We sued for 7, for the breach of the 7% commissions.

PASKO: That's what you were suing for?

MILLER: Yeah. That's what we were suing for. Everybody there read the Complaint, everybody there has been to a hundred meetings, this is a 7% commission suit.

PASKO: Why through the years have you been telling me I've got a case then?

MILLER: I told everybody that I thought they had a case. I didn't tell anybody I didn't think they had a case. What do you think I spent all my time with it for? Do you think I did it because I liked it? I did it because we thought we had a case. And until the Supreme Court changed the law we did have a case.

PASKO: That 7% that you're talking about didn't mean I thing to me, and I left in '83.

MILLER: I understand.

> PASKO: I was a full discharge. And you knew that. And you told me for the last 8 years that you had me protected.
>
> MILLER: Okay.
>
> * * *
>
> PASKO: And I think there's guys in here that know about how many times I've asked you that in these meetings. [Complainant's Amended Brief in Support of Petition for Review of Order of Tri-County Hearing Panel #64, Exhibit L.]

Later, however, Miller did say that "[t]he only hope is for the 20 people," by which it is possible that he meant the smaller group of plaintiffs who were pursuing wrongful discharge claims. *Id.*

IX. CONCLUSION

In my view, the record at least creates a question about whether Miller failed to fulfill his duties to the complainants as members of a smaller group of plaintiffs who sought to pursue wrongful discharge claims. The Grievance Administrator raises significant questions about the correctness of the ABD's decision to vacate the panel's order of reprimand, and persuasively argues that Miller violated a duty to communicate with his clients that pre-dated MRPC 1.4(b) and violated additional provisions of the Michigan Rules of Professional Misconduct. I also consider it significant that the panelists unanimously determined that Miller's conduct warranted a reprimand. The ADB found no flaw in the panel's factual determinations, but vacated the order of

reprimand on the basis of what is, in my view, a very questionable legal conclusion. I would grant leave to consider the correctness of that ruling and to consider complainants' and the Grievance Administrator's argument that Miller engaged in additional misconduct.

MARKMAN, J., joins the statement of CORRIGAN, J.

YOUNG, J., not participating, because he was general counsel for AAA when a portion of the underlying litigation was pending.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

s0413

April 16, 2010

/s/ Corbin R. Davis
Clerk

APPENDIX E

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

Case No. 06-186-GA

[Filed December 19, 2006]

Grievance Administrator, Attorney Grievance Commission, State of Michigan,	)
Petitioner,	)
v	)
Sheldon L. Miller, P-17785,	)
Respondent.	)

Formal Complaint

Petitioner, upon information and belief, states the following:

1. Respondent, Sheldon L. Miller, P-17785, was licensed to practice law in Michigan in 1962 and by virtue of said license is a member of the State Bar of Michigan who is subject to the jurisdiction of the Michigan Supreme Court and the Attorney Discipline

Board in matters of discipline for professional misconduct.

2. Respondent last maintained an office for the practice of law in the County of Oakland, State of Michigan.

3. As an attorney subject to the rules and regulations of the Michigan Supreme Court, Respondent is subject to the standards for discipline set forth in MCR 9.104(A).

Count One

4. Donald Durecki, Wayne Alarie, Richard Martin, and James Dziadziola, retained Respondent to represent them in an employment matter against the Auto Club of Michigan, following a July 1, 1978 change to the compensation system, but more significantly, new minimum production standards implemented in September 1981 which led to the subsequent termination of their sales positions. Durecki retained Respondent in 1983, while Alarie and Martin retained him on February 10, 1984, and Dziadziola did so on June 12, 1984.

5. On May 26, 1983, Respondent filed a civil suit in the Wayne County Circuit Court, entitled *Richard Dumas, Lynn McBride, and Eugene Pasco v Auto Club Insurance Association,* Case No. 83-316603-CK, and it was assigned to Judge John Hausner.

6. Alarie and Martin were added as plaintiffs to the *Dumas* action in the Third Amended Complaint, filed May 7, 1984.

7. Thereafter, Durecki and Dziadziola were added as plaintiffs to the *Dumas* action by subsequent amendment.

8. In 1984, 1985, and 1986, the original *Dumas* complaint was amended numerous times adding new plaintiffs, who eventually reached approximately 200 in number. Though the Respondent sought class action certification, the request was denied.

9. In the Common Allegations of the *Dumas* Complaint, the plaintiffs alleged that beginning in 1977 (subsequently amended to July 1, 1978), the Auto Club changed the way it compensated its sales staff from a 7% commission system, to a unit based system (hereinafter referred to as "the changed method of compensation.").

10. Additionally, in the Common Allegations of the Dumas Complaint the plaintiffs alleged that beginning in 1978 (subsequently amended to 1980, and thereafter corrected to September of 1981), the Auto Club adopted a new policy of placing an arbitrary sales quota requirement (known as the "quota based minimum production standards") upon them, which had as its underlying but undisclosed purpose to lead to the early termination of older employees.

11. Count I of the *Dumas* Complaint/Amended Complaints is entitled Breach of Contract. In pleadings, the plaintiffs summarized the Count I allegations as follows:

"Plaintiffs' charge of Breach of Contract is compromised of two separate allegations:

(a) That defendant breached an employment contract by changing the terms upon which plaintiffs are to be compensated, whereby plaintiffs no longer receive 7% commissions on all policies sold and renewed; and,

(b) That defendant breached an employment contract by unilaterally determining that it would begin enforcing minimum production standards. (See Plaintiffs' Application for Leave to Appeal, November 13, 1986).

12. Count II of the *Dumas* action, entitled Violation of the Elliott-Larsen Civil Rights Act, M.S.A. 3.548(101) et. Esq., alleged age discrimination and breach of contract premised upon the changed method of compensation and the quota based minimum production standards, and a resultant actual or constructive discharge or acceptance of lower salary.

13. The Dumas plaintiffs alleged additional theories in other counts entitled: Fraud and Misrepresentation, Unjust Enrichment, and Violation of MSA 28.584.

14. On or about July 1, 1983, the Auto Club filed a Motion for Accelerated Judgment/Motion for Summary Judgment, asserting:

(a) That the claims in Count I, Breach of Employment Contract, were preempted by the National Labor Relations Act and/or that such claims were within the

exclusive jurisdiction of the National Labor Relations Board:

(b) That Count I failed to state a claim, pursuant to *Toussaint v Blue Cross and Blue Shield* of *Michigan,* 408 Mich 579 (1980), for breach of contract; and,

(c) That the claims of age discrimination, unjust enrichment, fraud and misrepresentation, and violation of MSA 28.584, failed to state a cause of action or were, otherwise, without merit.

15. On January 10, 1984, Judge Hausner entered an order stating:

1. Count I - Breach of Contract:

a) Plaintiffs' Count I claim, isofar as it involves a challenge to Defendant's implementation of minimum production standards is preempted by the National Labor Relations Act, and thereby dismissed;

b) Plaintiffs' Count I claim, insofar as it involves a challenge to Defendant's change in its commission system with respect to insurance policies sold after that change, and renewals thereof, is also dismissed; and,

(c) Plaintiffs' Count I claim, insofar as it involves a challenge to Defendant's change in its commission system with respect to the renewal of insurance policies originally sold prior to that change is not dismissed, and Defendant's Motion is denied without prejudice to its right to renew that Motion after the completion of discovery.

2. Count II – Age Discrimination: Defendant's Motion is Denied without prejudice to its right to renew that Motion after the completion of discovery.

3. Count III – Intentional Infliction of Emotional Distress: Count III is dismissed in its entirety without prejudice.

4. Count IV – Violation of M.S.A. 28.584: Count IV is dismissed in its entirety.

5. Count V – Fraud and Misrepresentation: Count V is dismissed, with leave granted to amend the Complaint by no later than January 29, 1984.

6. Count VI – Unjust Enrichment: Count VI is dismissed, with leave granted to amend the Complaint by no later than January 20, 1984.

16. Though Durecki had not yet been added as a plaintiff, and Martin, and Dziadziola had not retained

Respondent until after Judge Hausner's January 10, 1984 Order dismissing the breach of contract claim (commonly referred to as a *Toussaint* claim) insofar as it involved the quota based minimum production standards, Respondent did not inform them of the dismissal of that claim, and thereafter added Durecki, Alarie, Martin, and Dziadziola as Plaintiffs to the *Dumas* action by filing amended complaints.

17. The effect of adding Durecki, Alarie, Martin and Dziadziola to the *Dumas* action was inconsistent with their interest in claiming wrongful discharge based on breach of contract (a *Toussaint* claim), arising out of the quota based minimum production standards, leaving them with a wrongful discharge claim based only upon a theory of age discrimination as set forth in the Elliott-Larsen Act.

18. Had Respondent informed Durecki, Alarie, Martin, and Dziadziola of Judge Hausner's January 10, 1984 Order Dismissing the Toussaint claim from the *Dumas* case, they would have had the opportunity to seek representation with one of a number of other law firms who were also representing similarily situated discharged Auto Club sales persons in pending cases which included breach of contract (*Toussaint)* claims and which had not been dismissed, or, in the alternative could have requested Respondent to file a separate lawsuit for them affording the possibility of assignment to a different judge.

19. At no time did Respondent advise Durecki, Alarie, Martin, or Dziadziola of their option to file a separate suit or to be added as additional plaintiffs to other counsels' pending cases, or to file new cases with new counsel, which would have placed them in a more

favorable position with viable breach of contract *(Toussaint)* claims.

20. The constituency of plaintiffs in the *Dumas* suit included a large group of sales agents who were still employed at the Auto Club, and another smaller group (approximately 40 in number) of sales people, including the four named in this Formal Complaint, who had been discharged from their employment with the Auto Club.

21. The quota based minimum production standards pertained to the small group of plaintiffs who were no longer employed and claimed wrongful discharge pursuant to age discrimination described in the Elliott Larson Act and breach of contract claim pursuant to *Toussaint.* Though the amended complaints included allegations that the changed method of compensation was a breach of contract as well as constituting age discrimination, it was the claim that quota based minimum production standards which lead their discharge that was of primary interest to Durecki, Alarie, Martin, and Dziadziola.

22. Though both the large and small groups of plaintiffs had asserted changed method of compensation claims, this claim was of primary interest to the large group of plaintiffs who were still employed and seeking compensation for a reduction in their salaries.

23. In March 1985, Judge Hausner set aside the January 10, 1984 order partially granting summary judgment on the breach of contract count. (See the Court of Appeals 2001 Opinion.)

24. In April 1985, Respondent filed a motion to be heard by Judge Michael Stacey to establish parameters for the litigation and though not yet set forth in writing, to gain the court's adoption of an agreement between Respondent and opposing counsel, which includes abatement of the wrongful discharge claim insofar as it was based upon the quota based minimum production standards and a breach of contract and/or age discrimination.

25. At the April 1985 hearing, though no motion for a stay, or any other pleading requesting a stay, was ever filed, Respondent indicated to Judge Stacey that an agreement had previously been discussed and agreed upon at a meeting with counsel for the Auto Club to litigate the changed method of compensation claim and to stay the parts of the case pertaining to the wrongful discharge claim premised on the quota based minimum production standard, because there were pending Michigan appellate court cases which may have been pertinent to the matter.

26. After the April 1985 hearing, Judge Irwin Burdick, sitting in absence of Judge Stacey, entered a May 8, 1985 order (herein after referred to as Judge Stacey's Order) that stated the claims regarding the changed method of compensation were to proceed to trial in a bifurcated process, with liability and damages tried separately, while "claims regarding production standards" were "stayed in their entirety pending resolution of appellate issues."

27. As the changed method of compensation claim was of primary interest to the large group of plaintiffs who were still employed, and was of little or no consequence to those who had been discharged, the

effect of Respondent's agreement for a stay and Judge Stacey's order adopting the agreement for the stay, was to proceed with the case as to the large group of still-employed plaintiffs, while the primary case of the small group, that being the claim for wrongful discharge pursuant to the quota based minimum product standard, was stayed.

28. Respondent's agreement to stay the wrongful discharge claims while continuing with the method of compensation claims had the effect of giving priority to the claims of those who were still employed, unbeknownst to the plaintiffs who had wrongful discharge claims.

29. Respondent failed to inform Durecki, Alarie, Martin, and/or Dziadziola of the meeting with the Auto Club counsel wherein the attorneys agreed to place the wrongful discharge claims on a stay and separating them from the method of compensation claims and thus, of those who were still employed.

30. Respondent did not obtain authority or approval from Durecki, Alarie, Martin and Dziadziola to stay their wrongful discharge claims, and further, failed to inform them of the stay.

31. At no time did Respondent inform Durecki, Alarie, Martin and Dziadziola that he agreed at a hearing with Judge Stacey to formerly place a stay of their claims for wrongful discharge on the record.

32. Respondent did not inform Durecki, Alarie, Martin and Dziadziola that Judge Stacey's 1985 order stayed their wrongful discharge claims premised upon

the quota based minimum production standards, per theories of breach of contract and age discrimination.

33. In 1986 and 1987, orders of summary disposition were entered in the *Dumas* case as to all allegations pertaining to the method of compensation.

34. The dismissal of the claims based upon the method of compensation was appealed to the Michigan Court of Appeals, and then to the Michigan Supreme Court and remained before the appellate courts until 1991.

35. During the period of 1985 and 1991, Durecki, Alarie, Martin and/or Dziadziola sent letters and/or placed telephone calls to and/or attended meetings with Respondent seeking the status of their matter.

36. In response to these requests for the status, Respondent misrepresented to them that their case was currently on appeal when in fact the wrongful discharge claim had been stayed and was not pending on appeal.

37. In 1989, the Michigan Supreme Court published *Bullock v Auto Club*, 432 Mich 472 (1989), which held that there was no federal pre-emption of the breach of contract claim (*Touissaint* claim), and the viability of such claims based upon the factual proofs was for the jury to decide.

38. Though the 1989 *Bullock* decision provided a basis for Respondent to have the stay lifted on the minimum production standards wrongful discharge claim, Respondent failed to take steps to have the stay lifted and those claims continued.

39. On July 31, 1991, the Michigan Supreme Court issued an Opinion affirming the 1986/87 orders of summary disposition. The Supreme Court denied the Plaintiffs' motion for rehearing on September 17, 1991.

40. In November of 1991, following the Supreme Court's Opinion, Respondent held a meeting with the *Dumas* plaintiffs to inform them of the Supreme Court's decision. At that meeting, Respondent stated in response to challenges from those in attendance that he had never been retained for wrongful discharge, but only the changed method of compensation claims, and that the wrongful discharge claims were "gone."

41. Alarie and Martin had learned of the November, 1991 closure meeting only belatedly, not having received any notice of it.

42. After the November 1991 meeting, Respondent failed to inform Durecki, Alarie, Martin and Dziadziola that their wrongful discharge claims had been placed on a stay, had not been appealed, and were not inclusive in the Supreme Court's affirmation of the trial court's orders of summary disposition.

43. In November or December of 1991, Alarie and Martin contacted Attorney Theodore Andris to express their concern that Respondent had mishandled their case.

44. On December 6, 1991, Attorney Andris sent correspondence to Respondent providing notice of his retention, requested the files, and a status.

45. When he did not receive a reply, Attorney Andris sent follow-up correspondence to Respondent on January 13, 1992.

46. Respondent replied to Attorney Andris on January 21, 1992 and stated no interest in pursuing any wrongful discharge claim on behalf of any of the *Dumas* plaintiffs and failed to mention that he had agreed to place the wrongful discharge claims on a stay in May, 1985 and an order staying that claim had been entered by Judge Stacey.

47. Respondent failed to send to Attorney Andris the entire requested files, but only sent portions thereof.

48. During the next several months, Attorney Andris encouraged Respondent to attempt to reinstate the case as to the wrongful discharge claims (or otherwise see it placed on the court's active docket) so that he would not have to file a legal malpractice action against him, but Respondent failed to do so.

49. On May 28, 1992, Respondent sent Attorney Andris a letter stating that Alarie's and Martin's cases "disappeared" with the Supreme Court's ruling.

50. In June, 1992, Attorney Andris filed a civil action against Respondent for legal malpractice.

51. In October 1992, Attorney Andris filed a motion in the *Dumas* case titled: Motion to File Appearance as Counsel in Front of the Honorable Judge H. Hausner for the Limited Purpose to Determine the Status of the Case on Behalf of Wayne Alarie and Richard Martin, Plaintiffs in *Wayne Alarie,*

et al v Lopatin, Miller, et al, Wayne County Circuit Court Case No. 92-215259-CZ.

52. After Attorney Andris filed the motion referenced in paragraph 51, Respondent continued his failure to disclose the 1985 stay.

53. Attorney Andris' October 1992 motion in the *Dumas* case, referred to above, was heard by Judge Hausner on November 13, 1992 at which time Judge Hausner ruled that the quota based minimum production standard age discrimination claims and/or breach of contract wrongful discharge claims had been abandoned by Respondent.

54. On February 1, 1993, Attorney Andris took Respondent's deposition in the legal malpractice action at which Respondent never disclosed that he agreed to the stay of the wrongful discharge claims, and testified that in his opinion he did not believe that Alarie or Martin had valid wrongful discharge claims.

55. On May 6, 1993, Attorney Andris took the discovery deposition in the malpractice case of Respondent's former associate, Attorney David Ravid, at which Mr. Ravid testified that Respondent agreed with Auto Club's counsel to put the wrongful discharge claims based upon the new quota system on stay while they first proceeded with the method of compensation issue.

56. This above described testimony of Mr. Ravid on May 6, 1993 was the first disclosure to Attorney Andris, and thus Alarie and Martin, of the 1985 stay.

57. Thereafter, Respondent's attorney in the malpractice action, Attorney Roger Wardle, filed a motion in the Court of Appeals stating that Respondent "discovered" the stay on May 7, 1993.

58. On remand from the Michigan Supreme Court for further evidentiary findings, a hearing was conducted by Judge Hausner on September 19, 1994. Judge Hausner explained in his September 19, 1994 ruling that, because the 1986 summary disposition order was titled as a final judgment, rather than as a partial summary disposition, and was appealed as a "matter of right," rather than as an interlocutory appeal, the *Dumas* case went off of the Wayne County Circuit Court docket and was no longer identified as an active case, notwithstanding the 1985 stay on the wrongful discharge claims. Judge Hausner further noted that he was never informed of the 1985 stay at the time of 1986 motion for summary disposition. Judge Hausner was of the opinion that Respondent should have moved to have lifted the stay once the appeal had ended in 1991. He did not change his 1992 dismissal and the appeal process continued.

59. Eventually the case was again returned to the trial court for further review, and it was reassigned to Judge William Giovan.

60. At a hearing which took place before Judge Giovan on March 22, 1996, which resulted in a ruling which he made on April 25, 1996, Judge Giovan held that the case against the Auto Club could proceed on the wrongful discharge claims, notwithstanding Respondent's actions, which Judge Giovan described as "negligent." The ruling was based on the assessment that Judge Hausner was technically

required to issue a notice of intent to dismiss due to lack of progress and had not done so.

61. Judge Giovan's decision was appealed, which process consumed many more years.

62. Finally, on June 21, 2001, the appellate court affirmed Judge Giovan's decision to allow the claims of the *Dumas* plaintiffs for wrongful discharge to proceed against the Auto Club.

63. On November 19, 2001, Respondent sent correspondence to his remaining clients informing them that they had a surviving claim remaining that they could pursue, and this is the first time that Respondent informed his clients, who still included Dziadziola, that their wrongful discharge claim was still available after the Supreme Court *Dumas* decision in the summer of 1991, rather having told them that their case was over.

64. After the 2001 Court of Appeals decision, Respondent again failed to take reasonable steps to advance the cases of the plaintiffs which had been formerly stayed (and who were not represented by new counsel), including Dziadziola, such as engaging in discovery and/or attempting a case evaluation.

65. Respondent acted adversely toward his former clients, Alarie and Martin, by attempting to defeat their wrongful discharge claims, sending counsel to cross examine them in their discovery depositions in the *Dumas* case.

66. Other sales people who were similarly situated as to Durecki, Alarie, Martin and Dziadziola,

as terminated Auto Club sales persons, had been represented by Attorney Andris and Attorneys John Mason (deceased) and George Washington commencing in the early 1980's, wherein their collective clients, numbering approximately 50, either won trial verdicts or settled their civil actions for substantial sums of money, some of which were in the hundreds of thousands of dollars.

67. In the summer of 2002, Respondent settled Dziadziola's case for $30,000. In contrast, Attorney Andris was able to settle Alarie and Martin's case for $300,000 each, after having obtained case evaluation amounts of $375,000 each.

68. Following the settlement with the Auto Club, Judge Giovan dismissed the malpractice suit filed by Alarie and Martin, concluding that the settlement precluded the suit from going forward.

69. Durecki went to trial against the Auto Club with new counsel, Attorney Mason, but, lacking evidence after 20 years, received a jury verdict of no-cause of action.

70. Judge Giovan dismissed Durecki's legal malpractice suit against Respondent.

71. Attorney Andris currently represents Dziadziola in a pending legal malpractice case against Respondent.

72. There remain pending legal malpractice cases against Respondent, which, upon conclusion and a final order or judgment, will allow for the filing of an

appeal of the malpractice cases of Alarie, Martin and Durecki.

Duties Violated

73. By reason of the conduct described in this Complaint, Respondent has engaged in the following misconduct in violation of MCR 9.104(A)(4) and MRPC 8.4(a);

a) failing to provide competent representation to a client, in violation of MRPC 1.1(a);

b) neglecting a legal matter, in violation of MRPC 1.1(c);

c) failing to seek the lawful objectives of a client through reasonably available means permitted by law and the Rules of Professional Conduct, in violation of MRPC 1.2(a);

d) failing to obtain the consent of the four clients identified herein, and those additional clients not identified by name but who were included in the smaller group of Plaintiffs who had wrongful discharge claims, to Respondent's limitation which he unilaterally placed on the objectives of his clients whom he was representing for wrongful discharge claims, in violation of MRPC 1.2(b);

e) failing to act with reasonable diligence and promptness, in violation of MRPC 1.3;

f) failing to keep a client reasonably informed concerning the status of a matter, in violation of MRPC 1.4(a);

g) failing to comply promptly with reasonable requests for information from his clients, in violation of MRPC 1.4(a);

h) failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b);

i) engaging in a conflict of interest by representing a client when representation of the client may have been materially limited by Respondent's responsibilities to another client or to a third person, or by Respondent's own interest, and Respondent did not, or should not have, reasonably believed the representation would not be adversely affected, and/or when Respondent failed to consult the client and/or failed to obtain the consent of his client, in violation of MRPC 1.7(b)(1) and/or (2);

j) engaging in a conflict of interest by representing multiple clients in a single matter but failing to have a consultation with the client that included the explanation of the implication of the common representation and the advantages and risks involved, in violation of MRPC 1.7(b)(2);

k) failing, upon termination of the representation of a client, to take reasonable steps to protect the client's interest, including but not limited to the surrendering the papers and the client file to which the client is entitled, cooperating with successor counsel, conveying written and verbal information regarding the representation to successor counsel, appearing (via counsel) at discovery depositions of former clients when represented by successor counsel and taking adverse positions to those clients, and otherwise engaging in activities that not only failed to assist the former clients with their wrongful discharge claims, but rather made the successful prosecution of those claims by successor counsel more difficult, in violation of MRPC 1.16(d);

l) failing to make reasonable efforts to expedite litigation consistent with the interest of a client, in violation of MRPC 3.2;

m) in the course of representing a client, making knowingly false statements of material facts of law to a third person, in violation of MRPC 4.1;

n) engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, where such conduct reflects adversely on the lawyer, in violation of MRPC 8.4(b);

o) knowingly providing false and/or misleading information to the staff of the Grievance Administrator in his answer to the Request for Investigation wherein Respondent represented that the wrongful discharge claims of the plaintiffs who had been terminated from their employment with the Auto Club was due solely to his efforts, in violation of MCR 9.103(C);

p) engaging in conduct that is prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(A)(1);

q) engaging in conduct that exposing the legal profession to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(A)(2); and,

r) engaging in conduct that is contrary to justice, ethics, or honesty, in violation of MCR 9.104(A)(3).

74. Each of the acts and omissions set forth above, constitute a separate breach by Respondent of his duty to conduct himself at all times, both personally and professionally, in conformity with the standards imposed upon members of the Bar as conditions for the privilege of practicing law in this State.

Petitioner requests that Respondent should be subjected to such discipline as may be warranted by the facts and circumstances of such misconduct.

Dated: December 19, 2006

/s/ Robert L. Agacinski
ROBERT L. AGACINSKI, P-10065
Grievance Administrator
Attorney Grievance Commission
243 W. Congress, Suite 256
Detroit, Michigan 48226
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APPENDIX F

Order
137111 (145)(159)

Michigan Supreme Court
Lansing, Michigan

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

SC: 137111
COA: 274743
Wayne CC: 03-325462-NI

[Filed March 31, 2010]

ANTHONY PELLEGRINO, Individually and as Personal Representative of the Estate of Shirley Ann Pellegrino,
Plaintiff-Appellee,

v

AMPCO SYSTEMS PARKING,
Defendant-Appellant.

By order of January 28, 2010, the Court granted the motion for full-Court consideration of the motion for disqualification of Justice Markman and denied the plaintiff's motion to disqualify Justice Markman.

By order of January 28, 2010, the Court denied the motion for a full-Court decision on the motion to disqualify Justice Corrigan.

By order of January 28, 2010, the Court denied the motion for a full-Court decision on the motion to disqualify Justice Young.

KELLY, C.J. (*concurring*).

I concur with the Court's resolution of the motions seeking the recusal of Justices Corrigan, Young, and Markman. I write separately in response to Justices Corrigan's and Young's decisions to not participate.

THE DUTY TO SIT

Justices Corrigan and Young's reason for not participating, as they have stated here and in their dissenting statements in ADM 2009-4, is that amended MCR 2.003 is unconstitutional. Surely Justices Corrigan and Young are entitled to their personal view on this subject. But neither this Court nor any other has adopted that view. Hence, amended MCR 2.003 is clothed in a presumption of constitutionality.[1]

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[1] Court rules are interpreted using the same principles that govern statutory interpretation. *Haliw v Sterling Hts*, 471 Mich 700, 704 (2005). Statutes are clothed in a presumption of

Moreover, a justice has an affirmative duty to participate to the extent possible in matters that are brought before this Court. As former Chief Justice Taylor and Justice Markman stated in a 2006 Court decision, "Particularly on the supreme court of a state, a body in which judges who recuse themselves cannot be replaced, it is necessary that judges participate in cases in which recusal is not required."[2] This doctrine is known as the "duty to sit." Under that duty, there is an obligation for a justice to remain on any case unless

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constitutionality. *Johnson v Harnischfeger Corp*, 414 Mich 102, 114 (1982); see also, *State v Albert*, 899 P2d 103, 113 n 15 (Alas, 1995) ("Court rules, like statutes and regulations, are presumptively constitutional and the burden of proving unconstitutionality is on the party challenging them."); *Suchit v Baxt*, 176 NJ Super 407, 425 (1980) ("Rules adopted by the Supreme Court are presumed constitutional, and it is the burden of the party contesting the rule to show that the Supreme Court's rule is in fact arbitrary and unreasonable."); *Campuzano v. Peritz*, 376 Ill App 3d 485, 490 (2007) ("'Supreme Court rules are to be construed in the same manner as statutes.' Statutes are presumed constitutional . . . .") (citations omitted); *State v Waldon*, 148 Wash App 952, 962 (2009) ("'"The construction of court rules is governed by the principles of statutory construction."' . . . Statutes are presumed constitutional as written and should be construed to be constitutional if possible. '[A] court rule will not be construed to circumvent or supersede a constitutional mandate.'") (citations omitted).

[2] *Adair v Michigan*, 474 Mich 1027, 1030 (2006) (statement of Taylor, C.J., and Markman, J.). Justices Corrigan and Young did not join former Chief Justice Taylor and Justice Markman's decision on the recusal motion in *Adair*, but they explicitly endorsed the legal analysis of the ethical questions presented in it. *Id.* at 1051 n 1 (statement of Corrigan, J.); *id.* at 1053 (statement of Young, J.).

disqualified from doing so.[3] Indeed, the United States Court of Appeals for the Second Circuit has opined that "where the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited."[4] Therefore, one wonders by what authority Justices Corrigan and Young refuse to acknowledge the constitutional status of the rule at present and, given their duty to sit, refuse to vote on this motion.[5]

THE CONSTITUTIONALITY OF MCR 2.003

With respect to their challenges to the constitutional status of MCR 2.003, Justices Corrigan and Young argue that the insertion in the rule of the "appearance of impropriety" standard has rendered the rule unconstitutional.[6] However, federal district courts

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[3] See *Laird v Tatum*, 409 US 824, 837 (1972) (memorandum of Rehnquist, J.).

[4] *In re Aguinda*, 241 F3d 194, 201 (CA 2, 2001).

[5] Justice Young claims that "it is not clear that the duty to sit even applies to collateral motions *within* cases before this Court." This distinction is unsupported by any authority. While a recusal motion may be "collateral" in that it is not dispositive of the merits of a controversy, it is surely critical to the ultimate resolution of a case. Their participation in the underlying appeal does not excuse Justices Corrigan and Young from their duty to sit in all matters before the Court from which they are not disqualified.

[6] Justice Young claims that my defense of the constitutionality of MCR 2.003 is "little more than a pastiche of legal non sequiturs." *Post* at __. The fact remains, Justices Corrigan and Young fail to cite any controlling authority for their assertion that MCR 2.003, as amended, or the "appearance of impropriety" standard,

have rejected First Amendment constitutional challenges to a recusal standard that is synonymous with the "appearance of impropriety" standard on numerous occasions.[7] Indeed, those courts have determined that a state has a compelling interest in preserving the public's confidence in the integrity and impartiality of its judiciary. Moreover, the courts have repeatedly found that such recusal rules are narrowly tailored to meet that interest and are neither overbroad nor vague.[8] As a result, they do not "chill" a

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generally, is unconstitutional. I do not contend that they have not given their reasons why they believe the rule is unconstitutional, but contend that their reasons lack apposite legal authority.

[7] These cases have arisen in situations in which organizations send questionnaires to judicial candidates seeking their views on controversial issues. Judges often refuse to respond, citing a possible breach of the judicial canons. The organizations then file suit, alleging that canons that call for recusal if a judge's impartiality might reasonably be questioned are unconstitutional because they chill a candidate's protected speech under *Republican Party of Minnesota v White*, 536 US 765 (2002).

The merits of these constitutional claims have not been addressed by circuit courts of appeals because they are generally dismissed due to a lack of standing or ripeness. See, e.g., *Florida Family Policy Council v Freeman*, 561 F3d 1246 (CA 11, 2009).

[8] *Bauer v Shepard*, 634 F Supp 2d 912, 948-950 (ND Ind, 2009); *Indiana Right to Life, Inc v Shepard*, 463 F Supp 2d 879, 887 (ND Ind, 2006), rev'd in part on other grounds 507 F3d 545 (CA 7, 2007); *Alaska Right to Life Political Action Comm v Feldman*, 380 F Supp 2d 1080, 1084 (D Alas, 2005), vacated in part on other grounds 504 F3d 840 (CA 9, 2007); *North Dakota Family Alliance, Inc v Bader*, 361 F Supp 2d 1021, 1043-1044 (D ND, 2005); *Family Trust Foundation of Kentucky, Inc v Wolnitzek*, 345 F Supp 2d 672, 687 (ED Ky, 2004).

judge's freedom of speech and do not violate the First Amendment.[9]

Furthermore, a justice's due process rights are not violated by the amended version of MCR 2.003. The rule does not deny any rights to a justice who is recused against his or her will. In his concurring opinion in *Republican Party of Minnesota*, Justice Kennedy noted that states are free to "adopt recusal standards *more rigorous* than due process requires, and censure judges who violate these standards."[10] Justice Kennedy's majority opinion in *Caperton v A T*

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[9] Assuming, *arguendo*, that MCR 2.003 limits a judicial candidate's constitutional right to free speech, it remains unclear if forced disqualification because of that speech constitutes a "penalty" giving rise to First Amendment standing. In *Florida Family Policy council*, 561 F3d at 1254-1255, the court declined to answer this question, concluding that the plaintiff could not show that his claim was redressable. If forced disqualification is not a "penalty," a justice cannot make an adequate showing of "actual injury" to establish standing. *Id.* at 1255 ("If . . . the only penalty is disciplinary sanctions for a refusal to disqualify, then a judge's fear of penalty is not objectively reasonable. The fear is not objectively reasonable because it depends on speculation and conjecture that instead of disqualifying himself where the canons require him to do so, the judge will refuse and face discipline.").

Canon 2 of the Michigan Code of Judicial Conduct is similar to Canon 3(E)(1) of the Florida Code of Judicial Conduct, which was at issue in *Florida Family Policy Council*. Canon 2 requires a judge to adhere to the "appearance of impropriety" standard, which presumably should result in the justice recusing himself/herself when an appearance of impropriety exists.

[10] *Republican Party of Minnesota*, 536 US at 794 (Kennedy, J., concurring) (emphasis added).

Massey Coal Co, Inc[11] reaffirmed this point. *Caperton* specifically observed that the vast majority of states have adopted the "appearance of impropriety" standard, a more rigorous standard than is required by due process. The Court noted that most disputes over disqualification will be resolved under state standards. Similar generally worded canons of judicial conduct have been upheld in the face of constitutional challenges raised by judges sanctioned under those canons.[12]

In support of their argument, Justices Corrigan and Young cite provisions of the state constitution that provide for removing a justice from office. But these provisions are inapposite. Recusal deals only with removing a justice from a case, not removing him or her from office.

For decades this Court has had an unwritten practice that allowed an individual justice to decide recusal motions directed at that justice. Additionally, we have held that each justice has equal power and authority with respect to his or her colleagues.[13] Thus,

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[11] *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252 (2009).

[12] See, e.g., *In re Assad*, __ Nev __; 185 P3d 1044, 1052 (2008), which upheld Canon 2, § 2(A) of the Nevada Code of Judicial Conduct against a due process challenge. Nevada Canon 2(A) provides, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

[13] See, e.g., *People v Paille #1*, 383 Mich 605, 607 (1970) ("Whatever intra-court battles occasioned the adoption of the

allowing an individual justice to overrule another justice's decision on a recusal motion would violate this principle. However, also for decades, a majority of four justices has had the authority to make binding orders and judgments on cases and controversies that come before the court.[14] A motion for the recusal of a justice is a "controversy" like others that come before the Court. This is especially true once a party has filed such a motion and the challenged justice has refused to recuse himself or herself.

Therefore, I disagree with Justices Corrigan and Young that the principle of "one man, one vote" and the voters' right to elect their justices are violated by MCR 2.003. The new recusal rule is intended to protect the due process rights of litigants when a justice improperly refuses to recuse himself or herself.[15] As

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restriction upon intra-court review, the wisdom of preventing judges of equal station from overruling each other abides.").

[14] In limited circumstances not applicable here, five votes are necessary for the Court to take action.

[15] Justice Young sees no justification for permitting the disqualification of a justice for a violation of Canon 2 of the Michigan Code of Judicial Conduct that has nothing to do with a particular case. *Post* at __. I disagree. Certainly such a justification would exist if a justice was apparently biased for or against the attorney representing a party in a case. In that event, it could be argued that the appearance of impropriety had nothing to do with the case itself. Another example could be found when a justice has become incompetent. If that justice's "'conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with . . . competence is impaired,'" *Caperton*, 129 S Ct at 2266 (citation omitted), then that justice should be recused; in that instance, the appearance of impropriety arguably has nothing directly to do with the

noted previously, the removal of a justice from an individual case is far different from the removal of a justice from office. Protecting the due process rights of litigants in a particular case or controversy thus *supports*, not undermines, the voters' right to elect fair and unbiased members of this Court.

Justice Corrigan also claims that her "research has disclosed that no state requires recusal on the basis of a general 'appearance of impropriety,' let alone permits other justices to force a colleague's recusal on the basis of such a standard." She is mistaken. By Justice Corrigan's own count,[16] there are at least eight other states in which a justice's decision not to recuse himself or herself may be reviewed by the entire court.[17] In other states, review by the full court may be available, but remains an open question. Similarly, virtually all states require recusal for the appearance of impropriety. Some states require recusal when the judge's impartiality might reasonably be questioned. This is a standard indistinguishable from the appearance of impropriety. Justice Corrigan thus attempts to make a distinction between the two when there is none.

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substance of the case from which the justice should be recused. From these examples, it becomes obvious that grounds for recusal should not be narrowly confined to the case before the court in order for a justice to be removed from the case.

[16] See the chart accompanying Justice Corrigan's statement in this matter.

[17] Justice Corrigan claims that many states' practices in this regard are unwritten and rarely exercised, so comparison is difficult. The fact remains that other states *do* allow justices to vote on their colleagues' recusal decisions.

Evidence that these two standards are functionally identical and treated as such abounds. For example, Mississippi allows its supreme court justices to review an individual justice's decision to deny a recusal motion. The Mississippi Rules of Appellate Procedure provide that "[a]ny party may move for the recusal of a justice of the Supreme Court or a judge of the Court of Appeals if it *appears that the justice or judge's impartiality might be questioned by a reasonable person* knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law." Miss R App P 48C(a)(i). Canon 2(A) of the Mississippi Code of Judicial Conduct defines the test for an "appearance of impropriety" as "whether, based on the conduct, the judge's impartiality might be questioned by a reasonable person knowing all the circumstances." Hence, the two standards are defined using *identical* language. Other examples equating the two standards are abundant in caselaw throughout the United States.[18]

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[18] See, e.g, *Tracey v Tracey*, 97 Conn App 278, 281 (2006) ("'The [party] has met its burden [of showing that a judge's impartiality might reasonably be questioned] if it can prove that the conduct in question gave rise to a reasonable appearance of impropriety.'") (citations omitted; second alteration added); *Sussel v Honolulu City & Co Civil Service Comm*, 71 Hawaii 101, 103 (1989) ("'[A]n appearance of impropriety' is the proper standard and any commissioner whose impartiality might reasonably be questioned should be disqualified from hearing the appeal."); Leslie W. Abramson, *Appearance of impropriety: Deciding when a judge's impartiality might reasonably be questioned*, 14 Geo J Legal Ethics 55, 55 n 2 (2000) ("Whether a judge's impartiality might reasonably be questioned is also referred to as the appearance of partiality, the appearance of impropriety, or negative appearances."). The title of Professor Abramson's law review article speaks for itself.

Justice Corrigan also criticizes the "appearance of impropriety" standard as a broad, generally subjective and aspirational standard by which judges cannot meaningfully judge one another. Yet Justice Young, who has joined Justice Corrigan's statement, explicitly disagrees. In *Henry v Dow Chem Co*, Justice Young, responding to Justice Weaver's statement regarding her participation in that case, stated:

> "Moreover, Justice Weaver has advocated a disqualification standard that requires judges to recuse themselves if there is merely an *appearance* of impropriety. She has cited with approval Canon 2 of the ABA Model Code of Judicial Conduct, which states that '[a] judge shall avoid . . . the appearance of impropriety in all of the judge's activities' and Model Canon 3(E)(1), which states that a judge 'shall disqualify . . . herself in a proceeding in which the judge's impartiality might reasonably be questioned.'
>
> "The disqualification standard that she has publicly championed is an *objective* standard, not a subjective standard to be determined by her say-so."[19]

In *Caperton*, Justice Kennedy also referred to the "appearance of impropriety" standard as an objective one.[20]

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[19] *Henry v Dow Chem Co*, 484 Mich 483, 544 (2009) (opinion by Young, J.) (citation omitted; emphasis in original).

[20] *Caperton*, 129 S Ct at 2266.

Finally, Justice Young, with whom Justice Corrigan agrees, claims that the "lack of case-specific limitations of the 'appearance of impropriety' clause illustrates the unseemly haste with which the majority was driven to amend" MCR 2.003. Haste did not occur here. Disqualification is an issue that has been at the forefront of the Court's attention for many years. In 2006, in *Grievance Administrator v Fieger*, Justice Cavanagh wrote:

> . . . I take this opportunity to note that three alternate proposals, two of which have been crafted by [the former] majority, regarding how this Court should handle disqualification motions have been languishing in this Court's conference room for a substantial period of time. In the same way I will look forward to the dust settling from the case at bar, I will similarly anticipate this Court's timely attention to the important matter of disqualification motions. I take my colleagues at their word that the issue of disqualification will be handled in a prompt manner in the coming months.[21]

Thus, criticism of the amendments of MCR 2.003 as being "hast[y]" is off the mark.

IMPLICATIONS OF NONPARTICIPATION

Justices Corrigan's and Young's decisions not to participate in today's decision are difficult to fathom. Apparently, the justices believe that their views

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[21] *Grievance Administrator v Fieger*, 476 Mich 231, 327 n 17 (2006) (Cavanagh, J., dissenting).

regarding the legitimacy of the validly enacted rule of this Court supersede the binding nature of the rule. They provide no authority justifying their refusal to vote.

The Michigan Supreme Court operates by majority rule, meaning that four justices have the power to render binding decisions on behalf of the Court. Those decisions bind not only the parties to the controversies before the Court, but also the individual members of the Court. Should an individual justice disagree with the majority's decision, that justice is free to dissent from the majority's action. But a dissenting justice is not entitled to ignore or abandon his or her duty to decide matters that come before the Court. Nor may a justice announce by declarative fiat that the Court's action is null and void. As Justice Young stated in *Sazima v Shepherd Bar & Restaurant*, "I was not aware that a *dissenting* justice could purport (much less had the authority) to nullify a holding of a majority of this Court by simple declarative fiat."[22] Justice Corrigan explicitly acknowledged this principle in her dissent from the amendments of MCR 2.003.[23]

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[22] *Sazima v Shepherd Bar & Restaurant*, 482 Mich 1110, 1111 (2008) (Young, J., concurring) (emphasis in original).

[23] See the order amending MCR 2.003, 485 Mich cxxiii-cxxiv (2009) (Corrigan, J., dissenting), citing *Paille #1*, *Dodge v Northrop*, 85 Mich 243, 245 (1891) ("Courts of concurrent jurisdiction cannot set aside or modify the orders and decrees of other courts of like jurisdiction."), *In re Wayne Co Prosecutor*, 110 Mich App 739, 742 (1981) (noting the holding in *Paille #1* that "the dual function of Detroit Recorder's Court as a magisterial court as well as a felony trial court does not provide for intra-court review whereby judges of equal station might overrule one another"), and *Wayne Co Prosecutor v Recorder's Court Judges*, 81 Mich App 317, 322

Justices Corrigan's and Young's decisions not to participate set a disturbing precedent that one cannot reasonably believe they intend to create. Their decisions are analogous to a justice refusing to participate in a matter governed by precedent from which that justice dissented. Essentially, Justices Corrigan and Young now state that, because they do not agree with MCR 2.003, as amended, they will refuse to follow it.[24] By contrast, I note that, despite his disagreement with the Court's amendment of MCR 2.003, Justice Markman has participated in each of this Court's decisions on the motions for recusal.

Furthermore, by refusing to vote in this matter, Justice Young engages in a telling inconsistency. In cases involving the application of MCR 7.305(B), Justice Young has voiced his belief that the court rule is unconstitutional but has conceded that he is bound to follow it. He thereafter participated in cases applying that rule. For example, in *In re Certified Question (Waeschle v Oakland Co Medical Examiner)*, Justice Young stated:

(1978) ("Judges of co-equal authority lack jurisdiction to set aside the orders of bond forfeiture issued by their fellow judges.").

[24] Justice Young claims that he "merely dissent[s]" from the Court's justifications for the amended disqualification rule. *Post* at __. But Justice Young's statement is not a dissenting statement. If it were, "(*dissenting*)" would appear after "Young, J." at the outset of the text. It does not. A dissenting statement would also indicate that Justice Young *is* participating, but that he disagrees with the Court's reasoning or analysis. By contrast, Justice Young's statement is an explanation of his refusal to participate and acknowledge that he is bound by MCR 2.003, as amended.

> I continue to adhere to my stated position in *In re Certified Question (Wayne Co v Philip Morris, Inc)*, that this Court lacks the authority under state law to answer certified questions. However, this position has failed to carry the day. As the final arbiter of state law, this Court has concluded that it has the authority to answer certified questions. Accordingly, while this Court may exercise that authority, I will exercise careful discretion before answering any certified question. I would decline to answer the question in this instance.[125]

Thus, Justice Young, despite disagreeing with the Court's conclusion in *In re Certified Question (Wayne Co v Philip Morris, Inc)* that it has the authority to answer certified questions, *did* in fact exercise that authority. He also properly conceded that a majority of this Court acts as the final arbiter of state law.

Having made that concession, Justice Young now claims that "this Court's final authority does not extend to questions of *federal* constitutional law."[26] Accordingly, he believes that he can rightfully refuse

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[25] *In re Certified (Waeschle v Oakland Co Medical Examiner)*, 485 Mich ___ (Docket No. 140263, entered March 12, 2010) (Young, J., dissenting) (citations omitted). In *In re Certified Question (Wayne Co v Philip Morris, Inc)*, 622 NW2d 518 (2001), Justice Young opined that the Court lacked the constitutional authority to resolve certified questions under MCR 7.305(B). He stated, "However, because that position did not carry the day, I concur in the order in this case requesting supplemental briefing and oral argument." *Id.*

[26] *Post* at __ (emphasis in original).

to participate in the matter now before the Court. Admittedly, this Court is not the final arbiter of federal constitutional law. That power rests with the United States Supreme Court. Yet, as Justice Young well knows, until a majority of this Court or the United States Supreme Court declares the rule unconstitutional under the state or federal constitution, a presumption of constitutionality attaches to the rule. Justice Young is not released from the binding effect of the presumption that the rule is constitutional by an earnest belief that it is unconstitutional. Also, he can hardly sustain his assertion that he has "never claimed that the Court's action [regarding the amendments of MCR 2.003] is ineffective" if he refuses to abide by the rule.[27]

Likewise, in *In re Certified Question from the Fourteenth District Court of Appeals of Texas (Miller v Ford Motor Co)*, the majority opined:

> Concerning Justice Cavanagh's solicitude for Justice Young's 'constitutional conscience,' Justice Young . . . has written that this Court lacks the authority to answer certified questions, but his position did not carry the day. Five justices, including Justice Cavanagh, disagreed. Just as Justice Cavanagh is within his rights as a supporter of certified questions not to answer a certified question in a particular case (his position here), Justice Young as an opponent of certified questions is within his rights to answer a certified question, because this is now a part of our state's 'judicial power.'

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[27] *Post* at __.

> Indeed, Justice Young has previously answered certified questions and, in fact, authored a majority opinion responding to a certified question. Justice Young also joined Justice Cavanagh's opinion in *Wayne Co [v Philip Morris, Inc]*. . . . In respecting that the law is the law even where he disagrees with that law, Justice Young's determination to respect the majority position of this Court and to participate in certified questions is the only honorable position that could be taken by a justice of this Court.[28]

Justice Young signed the majority opinion in that case. Yet now, in an analogous case involving application of a court rule that Justice Young believes is unconstitutional, he strays from his previously announced principles.

Finally, I do not expect that members of this Court will always agree about what the law is or how to apply it in a given case. But I do hope that our disagreements will focus on the legal issues,[29]

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[28] *In re Certified Question from the Fourteenth District Court of Appeals of Texas (Miller v Ford Motor Co)*, 479 Mich 498, 502 n 2 (2007) (citations omitted).

[29] Both Justice Young and Justice Corrigan claim that the majority has refused to consider the significant constitutional issues that they have asked be considered. *Post* at __. This claim is belied by the record of our public administrative conference of March 11, 2010, when the Court devoted more than 30 minutes of discussion to the merits of their proposed amendments to MCR 2.003. See minutes 2:35:30 to 3:08:55 of the March 11, 2010, public administrative conference at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed March 25, 2010).

providing a level of discourse appropriate to the state's highest court. The emotional[30] and political[31] rhetoric that peppers Justices Corrigan's and Young's statements is ill-suited to this pursuit.

CONCLUSION

In sum, Justices Corrigan and Young have abdicated their duty to sit in this matter. Additionally, their claim that MCR 2.003 is unconstitutional is without merit and unsupported by any legal authority. Nearly all other states employ a recusal rule incorporating language similar to our "appearance of impropriety" standard. Furthermore, in at least eight other states, a justice's decision not to recuse himself or herself may be reviewed by the entire court.

As amended, MCR 2.003 puts into writing for the first time a formal procedure for the disqualification of justices of this Court. In doing so, the Court has become more accountable to litigants and to the public generally. I continue to believe that the justice system and this Court can only be stronger for it.

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[30] See *post* at __ ("Chief Justice Kelly's . . . statement[] . . . contain[s] little more than a pastiche of legal non sequiturs."); *post* at __ ("MCR 2.003(C)(1)(b)(ii) is a startling and supremely stupid policy that could have no conceivable purpose . . . ."); *post* at __ ("Unfortunately, majorities rarely conceive or concede that *they* could be capable of abuse of power."); *post* at __ ("[The Chief Justice's] claim denigrates the judicial offices that Michigan citizens have entrusted to their judges.").

[31] See *post* at __ (""I think the national recusal movement is an effort to so gum up [judicial] elections that we are almost forced into an alternative, such as appointing judges."") (citations omitted).

HATHAWAY, J. (*concurring*).

I concur with this Court's resolution of the disqualification motions seeking the recusal of Justices Corrigan, Young, and Markman. Further, I fully agree with the analysis set forth in Chief Justice Kelly's concurring statement.

I, too, believe it is clear that our newly adopted amendments to MCR 2.003 are constitutional and appropriate. First and foremost, the United States Supreme Court has already addressed this issue. See *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). *Caperton* set forth, clearly and unequivocally, that it is appropriate for states to adopt the appearance-of-impropriety standard within their canons of ethics and to incorporate that standard into their disqualification rules. The *Caperton* opinion states:

> One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality. *Almost every State*—West Virginia included—*has adopted the American Bar Association's objective standard: "A judge shall avoid impropriety and the appearance of impropriety."* ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004); see Brief for American Bar Association as *Amicus Curiae* 14, and n. 29. *The ABA Model Code's test for appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."* Canon 2A,

Commentary; see also W. Va. Code of Judicial Conduct, Canon 2A, and Commentary (2009) (same).

* * *

These codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are "[t]he principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11. This is a vital state interest:

"Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 793 (2002) (Kennedy, J., concurring).

It is for this reason that States may choose to "adopt recusal standards more rigorous than due process requires." Id., at 794; see also *Bracy* v. *Gramley*, 520 U. S. 899, 904 (1997) (distinguishing the "constitutional floor" from the ceiling set "by common law, statute, or the professional standards of the bench and bar").

> "The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and *the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.*" [*Aetna Life Ins Co v*] *Lavoie*, [475 US 813,] 828[(1986)]. Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances. [*Caperton*, 129 S Ct at 2266-2267 (emphasis added).]

Our newly amended rule was designed to specifically address disqualification in keeping with the standards and principles enunciated in *Caperton*. Our new rule provides, in pertinent part:

> (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
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> * * *
>
> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v* [*A T*] *Massey* [*Coal Co, Inc*, 556] US __; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. [MCR 2.003(C)(1).]

The new rule is not unconstitutional or inappropriate merely because a minority of justices on this Court disagree with incorporating an *appearance of impropriety* standard within the rule. As recognized by the United States Supreme Court in the above-quoted language, the appearance-of-impropriety standard is part of a code that serves to maintain the integrity of our judiciary and the confidence of the public. *Caperton* recognized that appearances of partiality can rise to such an extreme level that the due process rights of parties become impaired, at which point disqualification is mandated by the United States Constitution. But *Caperton* also recognized that states are free to impose more rigorous standards than due process requires, including the *appearance of impropriety* standard. Accordingly, it is constitutional to expressly include this standard within the rule.

Further, I do not agree with any assertion that no other state requires recusal on the basis of a general *appearance of impropriety* standard. This argument is premised on the assumption that there is a difference between the standard "*A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned*," and a standard that requires recusal if there is an "*appearance of impropriety*," However, this argument draws a distinction where none exists. These standards are one and the same. As acknowledged in *Caperton*, the test for appearance of impropriety is "'*whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired*.'" *Caperton*, 129 S Ct at 2266 (citation omitted; emphasis added). This test *is* the standard for determining whether a judge's

impartiality might reasonably be questioned. The two are the same for purposes of disqualification.

Moreover, I do not agree with any assertion that incorporating the *appearance of impropriety* standard into our rule overshadows the other more specifically enumerated grounds for disqualification set forth in MCR 2.003(C)(1), or that the ABA Model Code[32] provides otherwise. The ABA Model Code does not define impartiality by reference to specifically enumerated examples of conduct, but rather uses the phrase "including but not limited to the following circumstances," followed by enumerated *nonexclusive* scenarios for recusal in which a "judge's impartiality might reasonably be questioned . . . ." Further, the comments to the ABA Model Code make clear that a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specifically enumerated provisions apply.

Finally, I find concerns about a justice's personal due process rights during the disqualification procedure to be misplaced. Rather, the proper concern is the rights of litigants to have a fair hearing by impartial jurists. I would direct those who believe that the rights of jurists are superior to the rights of the public to Canon 1 of the Code of Judicial Conduct, which provides:

> An independent and honorable judiciary is indispensable to justice in our society. A judge

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[32] The ABA Model Codes can be found at <http://www.abanet.org/judicialethics/resources/resources_aba.html> (accessed March 22, 2010).

> should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. *A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.* [Emphasis added.]

For all the above reasons, our disqualification rule is constitutional and appropriate.

CORRIGAN, J. (*not participating*).

I do not participate in the orders issued under the new version of MCR 2.003 for the reasons stated in my November 25, 2009, dissent from the rule's promulgation. Contrary to Chief Justice Kelly's assertions, Justice Young and I have exhaustively detailed our reasons for concluding that the rule is unconstitutional. See the order amending MCR 2.003, 485 Mich ___ (entered November 25, 2009, amended December 3, 2009, ADM 2009-4) (Corrigan, J., dissenting).[33] We also explain here that the duty to sit clearly cannot require official acts that would violate our oaths to uphold the federal and Michigan constitutions. Const 1963, art 11, § 1. Further, I object to the majority's application of the new rule to this case in light of its decision to adjourn the discussion of

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[33] Available at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-112509.pdf> (accessed March 8, 2010).

proposed changes to the rule previously scheduled for this Court's December 2009 and January 2010 public administrative hearings. As Justice Young observes, the proposed changes are intended to bring the rule into compliance with minimal due process and First Amendment requirements, yet the majority here applies the rule in its current form before even discussing the proposals.

The rule currently requires a justice's recusal on the basis of a mere "appearance of impropriety . . . ." MCR 2.003(C)(1)(b). Yet my research has disclosed that no state requires recusal on the basis of a general "appearance of impropriety," let alone permits other justices to force a colleague's recusal on the basis of such a standard. See the chart attached to this statement as Exhibit A. Instead, a majority of states apply rules apparently derived from the American Bar Association (ABA) model rule, which requires recusal if a judge's "impartiality might reasonably be questioned . . . ."[34] Even those states with significantly different rules do not employ an "appearance of impropriety" standard. Further, the vast majority of states employ a practice similar to that of the United States Supreme Court's and Michigan's traditional practices: an individual justice decides whether recusal is required. Indeed, only eight states allow justices to cast votes on their colleagues' recusals.[35]

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[34] See 2007 ABA Model Code of Judicial Conduct, Canon 2, Rule 2.11 (ABA Model Rule 2.11), available at <http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf> (accessed March 8, 2010).

[35] Further, many states' practices in this regard are unwritten and rarely exercised, so comparison is difficult.

Significantly, the commonly used ABA standard—"[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned"—appears at the outset of the ABA model rule's listing of grounds for recusal. ABA Model Rule 2.11(A). The comparable threshold Michigan standard, which read "[a] judge is disqualified when the judge cannot impartially hear a case," has now been eliminated. See former MCR 2.003(B). Before its elimination, the Michigan threshold standard for recusal —like those in other states similar to the ABA model rule's threshold—was followed by enumerated, nonexclusive reasons for recusal that informed and limited the meaning of the threshold standard. For example, in Michigan and under the ABA rule, a judge is disqualified if he is actually biased or prejudiced, see current MCR 2.003(C)(1)(a) and ABA Model Rule 2.11(A)(1), or if he has an economic interest in the subject matter in controversy, see current MCR 2.003(C)(1)(f) and ABA Model Rule 2.11(A)(3). But Michigan has now deleted its threshold standard and simply offers a list of nonexclusive, stand-alone reasons that require recusal. Most significantly, Michigan alone includes the "appearance of impropriety" as one of these independent criteria for recusal, MCR 2.003(C)(1)(b). This unique Michigan provision renders superfluous the remaining, more specific enumerated grounds for recusal that we previously shared with the majority of our sister states. Why would a party need to show that a justice is actually biased or has an actual economic interest in a case if that party can merely claim an *appearance* of impropriety under the generalized standards of Canon 2 of the Code of Judicial Conduct?

Chief Justice Kelly and Justice Hathaway assert that Michigan's "appearance of impropriety" standard is synonymous with the more common standard requiring recusal when "the judge's impartiality might reasonably be questioned." But, contrary to their implications, Michigan alone has adopted the "appearance of impropriety" as a stand-alone enumerated ground for recusal.[36] Although some courts consider the two standards to be roughly

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[36] Chief Justice Kelly and Justice Hathaway incorrectly imply that the United States Supreme Court observed in *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252 (2009), that the vast majority of states have adopted the "appearance of impropriety" as a *disqualification* standard. To the contrary, as *Caperton* makes clear, most states—like Michigan—have adopted judicial conduct standards comparable to Canon 1 of the 2007 ABA Model Code of Judicial Conduct and the accompanying rules. But these standards are not equivalent to enforceable recusal rules, let alone recusal rules that may be raised by a party and enforced against an individual justice's will. Indeed, although Chief Justice Kelly lists various states that employ an "appearance of impropriety" standard, the standard appears in their judicial canons, as her statement candidly shows; the standard does not appear in their recusal rules. Justice Hathaway also relies on *Caperton*, but this Court has not adopted a rule reciting the ABA Model Code's test for appearance of impropriety cited in *Caperton*. Further, contrary to Justice Hathaway's implications, I do not conclude that the recusal standard employed by many states and apparently approved by *Caperton*—"the judge's impartiality might reasonably be questioned"—is unconstitutional. Rather, I contest the unprecedented, broad wording of the new Michigan standard *combined* with the new power of a majority of this Court to vote to remove a fellow coequal justice from a particular case in the absence of any procedural safeguards. As I explain further below, it is this combination of factors that I believe threatens the due process rights of Michigan justices *and* litigants appearing before this Court.

equivalent, the language is not identical, and the plain meaning of "appearance of impropriety" under Canon 2 strikes me as dangerously broad in this context. Most significantly, my colleagues ignore or unconvincingly explain away the central problem with the "appearance of impropriety" standard: as just explained, because of this Court's unprecedented choice to adopt this standard as an independent reason for recusal, it effectively renders nugatory the remaining more specific reasons for recusal. Thus, our new, stand-alone criterion for recusal is most certainly *not* comparable to other states' *threshold* standards requiring recusal when a judge's "impartiality might reasonably be questioned," which are circumscribed by concrete, illustrative lists of specific reasons for recusal. If the majority's genuine intent is to bring Michigan in line with other states' standards, it should adopt the common standard—requiring recusal when a judge's impartiality might reasonably be questioned—as a *threshold* standard at the outset of our rule.

Moreover, as noted, an "appearance of impropriety" standard for recusal is particularly problematic in light of the majority's decision that it is empowered to disqualify other justices from hearing a case. The Chief Justice concedes that allowing one justice to overrule another justice's decision on a recusal motion violates the maxim that each justice has equal power and authority with respect to his colleagues. Yet she now justifies this seizure of power on the mere ground that, in essence, the majority rules. That is no explanation for the Court's purported authority in this matter. "Appearance of impropriety" is too nebulous a standard to justify removal of a justice from a case against his will. Certainly Canon 2 of the Michigan

Code of Judicial Conduct—like Canon 1 of the ABA Model Code and the comparable standards of many states—requires judges to "avoid all impropriety and appearance of impropriety." But we have no sound reason to incorporate this broad, aspirational standard into our binding, enumerated requirements for recusal. Because the standard is difficult to definitively apply, permitting a majority of justices to disqualify a peer on this basis creates a conspicuous threat to the due process rights of each member of this Court.

A written explanation by the voting justices of why they did or did not vote to disqualify a challenged justice from hearing a case does not solve this problem. Indeed, a written statement is meaningless. It does not afford due process when based on such a vague standard. The rule effectively gives a majority of justices carte blanche to disqualify their colleagues simply by articulating its impressions of why a challenged justice's participation *appeared* improper, without regard to the existence of the traditional, more objective grounds for recusal such as personal bias, involvement in the case, or economic interest in the case. This liberal procedure does not merely offend the removed justice's due process rights. As noted in my dissent from the adoption of our new rule, the rule nullifies the electoral choice of the people of Michigan by permitting the Court to decide which justices may participate in a given case. Moreover, particularly when, as in this case, one party seeks the recusal of justices and the other party opposes recusal, the procedure threatens the right of the opposing party to have his cause heard by an impartial court.

Recent developments in other states echo my previously stated concerns about the national push

among a handful of well-funded interconnected advocacy groups to chill campaign speech in an effort to hamper judicial elections. See the order amending MCR 2.003, 485 Mich ___ (issued November 25, 2009, amended December 3, 2009, ADM 2009-4) (Corrigan, J., dissenting). In particular, the Wisconsin Supreme Court recently rejected new rules that would require a judge to recuse himself even if he received a lawful campaign contribution from a party. Commenting on the effort to "'deprive citizens who lawfully contribute to judicial campaigns . . . of access to the judges they help elect,'" Wisconsin Supreme Court Justice David Prosser, Jr., warned: "'I think the national recusal movement is an effort to so gum up [judicial] elections that we are almost forced into an alternative, such as appointing judges.'" Koppel, *States Weigh Judicial Recusals,* Wall St J, January 26, 2010, at A8.

With general regard to Chief Justice Kelly's assertions, I concur fully in the responses offered by Justice Young. Indeed, it is not I who abdicate the duty to sit by declining to participate in the Court's decision under MCR 2.003. Quite to the contrary, the new formulation of MCR 2.003 threatens a justice's duty to sit in cases in which recusal would not be required by any other state in the nation. I have properly discharged my duty to sit by denying the motion for recusal directed at me; I stand ready to hear the controversy before us. I have also properly exercised the duties of my office—which are rooted in my oath to uphold the Constitution of the United States and the Michigan Constitution, Const 1963, art 11, § 1—by declining to participate in the majority's decision with regard to the motion for recusal directed at Justice Markman because I believe the new provisions of MCR 2.003 are unconstitutional.

For the foregoing reasons, I do not participate in the majority's decisions under the unconstitutional new version of MCR 2.003. I further continue to urge my colleagues to rethink their adherence to this new rule in its current form.

YOUNG, J. (*not participating*).

I do not participate in the order or the Court's decision-making under the new rule for the reasons stated in my November 25, 2009 dissent from the rule's promulgation.[37]

As I have previously stated, MCR 2.003 as amended is unconstitutional.[38] That the majority has refused to consider the significant constitutional issues arising under the amended rule that I have raised is especially troubling. In particular, on November 19, 2009, before the order amending MCR 2.003 entered, I circulated to the Court a series of substantive amendments that addressed the basic due process and First Amendment problems with the rule the majority

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[37] See 485 Mich civ, cxxxii (2009) (Young, J., dissenting). At the time I denied the motion to disqualify, I issued a statement explaining my reasons for doing so. A copy of that statement is attached as Exhibit A.

[38] The Chief Justice claims that I "fail to cite any controlling authority for [my] assertion that MCR 2.003, as amended, or the 'appearance of impropriety' standard, generally, is unconstitutional." *Ante* at __ n 6. I invite the Chief Justice to reread (or read) my dissenting statement to the order amending MCR 2.003, entered on November 25, 2009, to become acquainted with the arguments that I marshal on behalf of my position on the rule's unconstitutionality. A copy of that order is attached as Exhibit B.

nevertheless adopted on November 25, 2009.[39] In the more than four months since I proposed them, not only have the members of the majority failed to provide me with any written or oral feedback on these amendments, they have also refused to consider these amendments at our December 10, 2009, and January 27, 2010, public administrative conferences, even though they were scheduled to be considered. That the majority is willing to review their fellow justices' recusal decisions under the new rule in the face of its serious constitutional problems indicates an appalling indifference to the role of this Court in enforcing the rule of law.

RESPONSE TO CHIEF JUSTICE KELLY AND JUSTICE HATHAWAY

Chief Justice Kelly's and Justice Hathaway's statements explaining the duty to sit and defending the constitutionality of MCR 2.003 contain little more than a pastiche of legal non sequiturs. As such, I will address the various points they raise seriatim.

(1) I am heartened to discover that the Chief Justice now recognizes the duty to sit. She is correct in stating that "'it is necessary that judges participate in

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[39] A copy of the amendments I proposed that are currently before the Court, but have been passed twice from consideration at public conferences, is attached as Exhibit C. These proposed amendments are substantially similar to the proposed amendments that I circulated on November 19, 2009, but also incorporate some suggestions from Justice Markman that I received in the interim.

cases in which recusal is not required.'"[40] However, because every justice takes an oath of office to uphold the constitutions of the United States and the state of Michigan,[41] a justice is also obligated to respect his or her constitutionally limited authority when deciding a case. Accordingly, just as a justice has the responsibility to raise sua sponte the issues of standing or subject matter jurisdiction in order to determine whether deciding the merits of a case exceeds the justice's constitutional authority, a justice has a similar responsibility not to rule on motions that require an action beyond the scope of that constitutional authority.

(2) Moreover, it is not clear that the duty to sit even applies to collateral motions *within* cases before this Court. The duty to sit requires a justice to "participate in *cases* in which recusal is not required."[42] Even though I do not participate in this Court's review of the motions to disqualify, I continue to participate in the defendant's underlying appeal in this case because my

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[40] *Ante* at , quoting *Adair v Michigan*, 474 Mich 1027, 1030 (2006) (statement of Taylor, C.J., and Markman, J.).

[41] Const 1963, art 11, § 1 requires "[a]ll officers, legislative, executive and judicial, before entering upon the duties of their respective offices [to] take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state ."

[42] *Adair*, 474 Mich at 1030 (statement of Taylor, C.J., and Markman, J.) (emphasis added).

recusal is not required.[43] For this independent reason, my nonparticipation in the decision of this motion is not a violation of my duty to sit.

(3) The Chief Justice generously notes that I am entitled to my view on the constitutionality of MCR 2.003. While I am grateful that she concedes as much, the citizens of this state deserve more from its senior court. It is not enough, as the Chief Justice asserts, to claim that all that this Court does is "clothed in a presumption of constitutionality." Were that the case, there would be no need to consider any constitutional challenge to this Court's rules. I have not challenged the constitutionality of MCR 2.003 lightly. Even if my views are repudiated by this Court, the constitutional challenges I have raised deserve serious consideration by this Court. Thus far, the majority has studiously avoided consideration of these challenges, either before adopting this modified disqualification rule or afterward.

(4) Throughout their defenses of MCR 2.003, the Chief Justice and Justice Hathaway conflate two of the new substantive requirements under MCR 2.003 and in doing so also misleadingly suggest that the "appearance of impropriety" standard is one that the vast majority of states have adopted. The previous substantive requirements requiring a judge's recusal under the former version of MCR 2.003 mandated recusal whenever "the judge cannot impartially hear

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[43] A copy of my statement denying the motion to disqualify is attached as Exhibit A.

a case . . . .[44] This was an actual bias standard.[45] The former rule then provided a nonexclusive list of proxies for actual bias requiring recusal, as well as safe harbors that allowed a judge's participation in a case absent a different reason for disqualification.

The new substantive requirements mandate recusal when

> [t]he judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v* [*A T*] *Massey* [*Coal Co, Inc*], [556] US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), *or* (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.[46]

I need not rehash the persuasive evidence that Justice Corrigan has marshaled in her statement showing that Michigan is now *unique* in expressly adopting an "appearance of impropriety" standard as a basis for disqualification. **To put the matter bluntly, there is *no other* disqualification rule in the country like the one we have adopted.**

However, in defending the "appearance of impropriety" standard, the Chief Justice and Justice

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[44] Former MCR 2.003(B). This standard also appeared in GCR 1963, 912.2(a).

[45] *Cain v Dep't of Corrections*, 451 Mich 470, 495 (1996).

[46] MCR 2.003(C)(1)(b) (emphasis added).

Hathaway also fail to recognize an important distinction between the two parts of MCR 2.003(C)(1)(b). The first part of this subrule recognizes the requirements of due process as articulated in *Caperton* and applies only when a judge's conduct affects the *due process rights* of a party in the context of a particular case. ***The second part of this subrule*** applies all of Canon 2 of the Michigan Code of Judicial Conduct ***without requiring that the judge's violation of Canon 2 be relevant to a party's rights in a particular case.***[47] Justice Hathaway claims that *Caperton* articulates a test for an "appearance of impropriety" centered on "'*whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.*'"[48] However, the "appearance of impropriety" standard contained in MCR 2.003(C)(1)(b)(ii) comes from the Michigan Code of Judicial Conduct, not *Caperton*, and, more importantly, ***does not contain any limiting***

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[47] For example, Canon 2(A) requires a judge to "avoid all impropriety and appearance of impropriety." Also, contained within Canon 2(B) is the requirement that a judge "respect and observe the law." Accordingly, under the text of this new rule, a judge who received a traffic ticket for driving faster than the posted speed limit, and therefore who knowingly failed to "observe" the law, can be disqualified from a case for failing to meet the "appearance of impropriety" standard, *even if this conduct has no reasonable relevance to whether the judge can impartially hear cases before him.* This conclusion is borne out by the nature and relation of the two clauses. The first is limited to the parties' due process rights; the second is not.

[48] *Ante* at __, quoting *Caperton*, 129 S Ct at 2266 (emphasis in Justice Hathaway's statement).

language. MCR 2.003(C)(1)(b)(ii) is a startling and supremely stupid policy that could have no conceivable purpose other than to permit a majority of this Court to remove a fellow justice for any violation of Canon 2, however unrelated to a justice's partiality or impartiality in an underlying case. Rather than disclaim such intention, the Chief Justice *confirms* that "grounds for recusal should not be narrowly confined to the case before the court in order for a justice to be removed from the case."[49] This admission, that a justice *should be removed for reasons having nothing to do with his or her ability to rule in a particular case*, speaks volumes and shows that the majority's intention in promulgating the new "appearance of impropriety" standard is to give the majority a large hammer to wield in its arbitrary use of power.

The Chief Justice's conflation of the distinction between the two clauses of MCR 2.003(C)(1)(b) renders misleading her claim that "federal district courts have rejected First Amendment constitutional challenges to a recusal standard that is synonymous with the 'appearance of impropriety' standard . . . ."[50] She cites five federal district court decisions that she purports accepted "such recusal rules" as "narrowly tailored to meet [the states'] interest and . . . neither overbroad nor vague." The five cases that the Chief Justice cites, however, involved recusal rules that are *substantially narrower* than Michigan's unique "appearance of impropriety" standard. They all relied on a standard

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[49] *Ante* at __ n 15.

[50] *Ante* at __.

requiring recusal when a judge's "impartiality might reasonably be questioned." There is a significant difference between that standard and the "appearance of impropriety" standard the majority has now engrafted on the old rule. The former has a longstanding provenance in the disqualification jurisprudence of many jurisdictions; the latter, none.

In *Alaska Right to Life Political Action Comm v Feldman*, for example, the United States District Court for the District of Alaska upheld the constitutionality of Alaska's judicial canon requiring recusal when a judge's "impartiality might reasonably be questioned":

> In summary, "[w]hen a judge may have a particular bias or prejudice, the recusal provisions require the judge to remove himself or herself from the case." More specifically, "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Without further analysis, the Court concludes this canon is narrowly tailored to serve a compelling State interest, i.e., it offers assurance to parties that the judge will apply the law in the same manner that would be applied to any other litigant. Consequently, it survives Plaintiffs' constitutional challenge.[51]

The remaining four cases that the Chief Justice cites apply similar standards that specifically involve a

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[51] *Alaska Right to Life Political Action Comm v Feldman*, 380 F Supp 2d 1080, 1084 (D Alas, 2005) (citations omitted).

judge's impartiality *in a given case.*[52] As stated, the "appearance of impropriety" standard contains no such limitation to a particular pending case. It has never been incorporated into a disqualification rule as has the "impartiality might reasonably be questioned" standard. If the goal of the new, supposedly "objective" standard is simply to prevent the risk of bias in the context of a particular case, then the first clause of the subrule suffices. However, if the "appearance of impropriety" clause is not to be rendered nugatory, it *must* apply generally to a judge's conduct, no matter how unrelated to the case at hand. I do not see how the majority can deny that the second clause must be broader than the first. If the members of the majority do, what is their justification for *permitting* the disqualification of a justice for a violation of Canon 2

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[52] *North Dakota Family Alliance, Inc v Bader*, 361 F Supp 2d 1021, 1043 (D ND, 2005) (interpreting ND Code of Judicial Conduct, Canon 3(E)(1), which requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"); *Family Trust Foundation of Kentucky, Inc v Wolnitzek*, 345 F Supp 2d 672, 705-711 (ED Ky, 2004) (interpreting Ky Sup Ct R 4.300, Ky Code of Judicial Conduct, Canon 3(E)(1), which requires a judge to disqualify "himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"); *Indiana Right to Life, Inc v Shepard*, 463 F Supp 2d 879, 886-887 (ND Ind, 2006) (interpreting former Ind Code of Judicial Conduct, Canon 3(E)(1), which required a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"); *Bauer v Shepard*, 634 F Supp 2d 912, 948-950 (ND Ind, 2009) (interpreting Ind Code of Judicial Conduct, Canon 2, Rule 2.11(A)(5), which requires a judge's recusal when that judge has made a public statement (other than one in a court proceeding, judicial decision, or opinion) that "commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy").

that has nothing to do with a particular case? The breadth of this second clause alone should trouble the majority. Unfortunately, majorities rarely conceive or concede that *they* could be capable of abuse of power.

The prevention of an elected official from performing his or her duties is a very serious matter, and thus a rule allowing removal of a judge from a particular case should be clear and must be narrowly tailored to the circumstances of a particular case. Any other standard, including an "appearance of impropriety" standard encompassing all conduct, however unrelated to the case at hand, is impermissibly broad and interferes with the due process rights that inhere in the office. The lack of case-specific limitations of the "appearance of impropriety" clause illustrates the unseemly haste with which the majority was driven to amend not only the procedures for this Court's determination of disqualification motions but also the substantive standards by which such motions are decided.[53]

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[53] Although disqualification has been an issue before the Court for some time, the "appearance of impropriety" standard is a much more recent development. This new standard was not incorporated into any of the three proposals that this Court published for comment in March 2009. See *Proposals Regarding Procedure for Disqualification of Supreme Court Justices*, 483 Mich 1205 (2009). Justice Hathaway first proposed the "appearance of impropriety" standard on October 22, 2009, two weeks prior to the November 5, 2009, administrative conference at which the Court voted on adopting the new standard. Moreover, I shared the following exchange with Justice Hathaway at that conference when I inquired about the nature of her proposed standard:

Because the disqualification of a judge implicates the electorate's right to seat a court of its choosing, the standards for disqualification must be exceedingly clear. The "appearance of impropriety" standard is anything but.

In conflating the general "appearance of impropriety" standard that the majority has promulgated with the case-specific standard that other states and *Caperton* require, the Chief Justice elides the important First Amendment issues uniquely involved in the context of Michigan's court rule. There are different issues involved when a judge's speech implicates a party's due process rights to have a neutral arbiter than when a judge's speech implicates a nonconstitutional "appearance of impropriety" court

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> *Justice Hathaway*: If there is an appearance of impropriety, then you cannot sit on a case.
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> *Justice Young*: And from what perspective is the appearance of impropriety? Is it a subjective standard? Is it an objective standard?
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> *Justice Hathaway*: I haven't thought through all that to be honest with you, to answer you here.
>
> *Justice Young*: But we're going to vote on this today.
>
> *Justice Hathaway*: Then let's vote.

In light of this exchange, I will leave the reader to determine the correctness of Chief Justice Kelly's claim that "criticism of the amendments of MCR 2.003 as being 'hast[y]' is off the mark." *Ante* at __.

rule.[54] This is particularly true in light of the decision of the people of Michigan to retain their sovereign right to elect judges.

In every written constitution since 1850, the people of Michigan have retained their sovereign right to elect judges rather than surrender that right to some other process. Accordingly, judicial aspirants in Michigan campaign for judicial office. In campaigning, they will engage in political speech that is clearly protected under the First Amendment. The protection of speech guaranteed under the First Amendment is especially important within the context of political campaigns. James Madison, drafter of the First Amendment, wrote:

> The value and efficacy of [the right of elections] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.[55]

Thus, any restrictions on campaign speech not only infringe on a candidate's right to speak, but also infringe on the *public's* right to vote intelligently on their candidates.

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[54] I believe no one in the majority that promulgated the "appearance of impropriety" standard, including the Chief Justice, has urged that it was of constitutional dimension.

[55] James Madison, *Report on the Virginia Resolutions*, available at <http://presspubs.uchicago.edu/founders/documents/amendI_speech-s24.html> (accessed March 25, 2010).

The importance of citizens' decisions regarding whom to entrust with public office deserves no less than a robust public discussion of issues by candidates seeking their votes. ***The amended court rule frustrates this kind of political discussion between judicial candidates and voters and penalizes a judicial candidate for trying to do so.*** The amended court rule expressly contemplates that campaign speech protected under the First Amendment will nevertheless cause a duly elected judge to be disqualified from hearing a case. This is so because the new rule establishes that a judge's political speech is subject to an "appearance of impropriety" limitation that the Chief Justice recognizes extends beyond the due process requirements that *Caperton* mandated.

Thus, even if the challenged political speech in no way implicated actual bias against a party (or any other constitutional right of that party), an elected justice would still be liable to be disqualified if his or her campaign comments were later determined to have created an appearance of impropriety. It is not hard to contemplate campaign speech that might offend someone's sensibilities and later be considered "improper" under the new rule's standard.

Moreover, the mere *threat* of future disqualification produces a chilling effect on protected speech. The United States Supreme Court's decision in *Republican Party of Minnesota v White* struck down the Minnesota Supreme Court's rule forbidding an incumbent judge or candidate for judicial office from "'announc[ing] his or her views on disputed legal or political issues'"

during an election campaign.[56] While the Minnesota Supreme Court's restriction on campaign speech was more expressly content-based than the restrictions promulgated by the new rule, ***the new majority here is attempting to achieve indirectly what the United States Supreme Court declared in*** **White** ***that a court could not do directly: stifle protected judicial campaign speech.*** The new "appearance of impropriety" standard is so broad and vague that judges and judicial candidates will be forced to self-limit their campaign speech so that, once they are elected, they can actually exercise the duties of the office they have sought. **Thus, this rule is facially unconstitutional because it expressly allows a jurist's First Amendment right to free speech to be subordinated to a nonconstitutional standard.** *The new majority is untroubled by this obvious abridgement of First Amendment rights that their new rule causes. And the abridgment is even more invidious because the appearance of impropriety is not tied to a violation of a party's constitutional rights.*

(5) The Chief Justice also questions whether the removal of a judge from a case against his or her will for any speech protected under the First Amendment constitutes a sufficient injury in fact for standing purposes.[57] Such a claim denigrates the judicial offices that Michigan citizens have entrusted to their judges. The disqualification of a judge from exercising his or her judicial office in a particular case for having

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[56] *Republican Party of Minnesota v White*, 536 US 765, 768 (2002) (citation omitted).

[57] *Ante* at __ n 9.

asserted protected speech is a cognizable injury in fact sufficient to establish standing. Indeed, though it did not decide the issue, the United States Court of Appeals for the Eleventh Circuit has recognized as "non-frivolous" the argument that "forcing a judge to disqualify himself . . . is a penalty in itself."[58] It is hard to imagine why removing a judge from a case would not support standing to challenge the legitimacy of the removal. It would be passing strange to contemplate any contrary rule under which the very officeholder being prevented from exercising the duties of office lacked standing to challenge the prevention. Chief Justice Kelly offers no rationale or authority for her assertion to the contrary. There is an obvious reason why she has not.

(6) The Chief Justice also states, in an entirely conclusory fashion and without citing any authority: "The rule does not deny any rights to a justice who is recused against his or her will." She fails to address the serious due process concerns that I expressed before the adoption of the amendments. Justice Hathaway responds to my arguments by calling into question my commitment to litigants' due process rights, noting that "concerns about a justice's personal due process rights during the disqualification procedure [are] misplaced" and suggesting that I "believe that the rights of jurists are superior to the rights of the public . . . ."[59] This is entirely untrue. The due process rights of litigants *must* be respected.

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[58] *Florida Family Policy Council v Freeman*, 561 F3d 1246, 1255 (CA 11, 2009).

[59] *Ante* at __.

However, that need not and may not be done by creating a process that itself is lacking in due process rights. Justice Hathaway's disregard of these *basic* due process rights speaks volumes. While the new rule protects the due process rights of litigants, it need not in Justice Hathaway's calculation provide judges with basic guarantees of due process when resolving disqualification motions.

Moreover, the *public* has an important interest in ensuring that their chosen judicial officers are treated fairly during the disqualification process, which is far from being a concern solely about *justices'* due process rights. The removal of a sitting justice against his or her will is a serious matter trenching upon the right to execute the duties of office to which the justice was elected as well as an infringement on the right of electors who placed the justice in office. Before the amendment of MCR 2.003, only a decision of the United States Supreme Court could reverse a Michigan justice's determination regarding a motion for recusal. In interposing itself in this decision as an appellate body, this Court must afford the targeted justice no fewer rights than he or she would enjoy in such an appeal to the United States Supreme Court of a denial of a motion for recusal. These include the right to have the matter heard by an impartial arbiter, the right to counsel, the right to have the issues framed, and the right to present arguments.

Thus, I have proposed that any appeal of a justice's denial of a motion for recusal must be limited to the grounds stated in the motion and that the justice must be allowed to retain counsel in the matter and submit a brief in response to the motion. If due process means anything—particularly in the disqualification setting,

where this issue is pivotal— a targeted justice is most assuredly entitled to an *impartial* arbiter.[60] When personal and political biases could affect the decision-making of members of this Court in the new disqualification appeal process, I cannot imagine that due process demands less than the right to challenge such potential biases of the decision-makers. Accordingly, I proposed amendments that would ensure that this cardinal due process right is preserved, so that a targeted justice facing an appellate review of his or her denial of the recusal motion can challenge the potential biases of other members of this Court. The members of the majority are loathe to permit such a bias challenge, but not because they fail to recognize that there are serious political and personal antagonisms among this Court's members.

Similarly, due process also demands an adequate opportunity for a challenged justice to be heard.[61] Sometimes, this will also entail an evidentiary hearing. I have therefore proposed a procedure for this Court taking evidence. No justice in the majority has explained why any of the due process rights enjoyed before the new rule was promulgated have now lost their constitutional status. I welcome any effort by the majority to justify why these due process rights have now been banished by the Michigan Supreme Court.

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[60] "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

[61] "The fundamental requisite of due process of law is the opportunity to be heard." *Dow v Michigan*, 396 Mich 192, 205 (1976) (quotation marks and citations omitted).

(7) The Chief Justice claims as "inapposite" my previous citation of provisions in the state constitution that limit the ability to remove a justice from office.[62] It is true, as I have noted, that these constitutional provisions only refer to removal of a justice from *all* cases, not from a *particular* case. However, as I explained in my dissent from the adoption of amended MCR 2.003, there is no provision in the Michigan Constitution that explicitly allows a majority vote of this Court to overturn the elective will of the People and remove a justice from an individual case, nor is there any language that would even implicitly provide such authority. The Chief Justice offers no constitutional provision to refute this claim, only explaining that "[a] motion for the recusal of a justice is a 'controversy' like others that come before the Court."[63] Clearly, there are limits even to this Court's adjudicative authority. The Chief Justice does not, I hope, suggest that this Court has the constitutional authority to adjudicate *any* "controversy." Moreover, as I have explained at length here and in my original dissenting statement, the removal of a fellow justice from a case against the will of the electorate—potentially for reasons that have nothing to do with the justice's impartiality in a particular case—is far from an ordinary "controversy."

(8) Finally, the Chief Justice claims that my decision not to participate is tantamount to "announc[ing] by declarative fiat that the Court's

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[62] *Ante* at __. See also 485 Mich civ, cxxxix-cxlii (2009) (Young, J., dissenting).

[63] *Ante* at __.

action is null and void."[64] I have never claimed that the Court's action is ineffective. Instead, I merely dissent from the justifications, such as they are, for this Court's amended disqualification procedures because I reach a different constitutional conclusion: that the disqualification procedures fail to protect due process rights guaranteed under the United States Constitution. The Chief Justice claims that my decision not to participate in disqualification proceedings is inconsistent with my participation in cases involving certified questions arising under MCR 7.305(B). She quotes with approval my recent statement in a certified question case:

> I continue to adhere to my stated position in *In re Certified Question (Wayne Co v Philip Morris Inc)*, 622 NW2d 518 (Mich, 2001), that this Court lacks the authority under state law to answer certified questions. However, this position has failed to carry the day. As the final arbiter of state law, this Court has concluded that it has the authority to answer certified questions.[65]

The Chief Justice and I, therefore, agree that this Court's declarations of state law are final. Nevertheless, this Court's final authority does not extend to questions of *federal* constitutional law. As I have explained, both above and in previous statements, the amendments to MCR 2.003 violate the

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[64] *Ante* at __.

[65] *In re Certified Question (Waeschle v Oakland Co Med Examiner)*, 485 Mich __ (Docket No. 140263, entered March 12, 2010) (Young, J., dissenting) (citation omitted).

protections of due process guaranteed by the United States Constitution. This Court cannot abrogate these protections, and the majority's conclusion that the amendments to MCR 2.003 satisfy the United States Constitution does not authoritatively make it so. Accordingly, I refuse to participate in procedures that violate the protections of the United States Constitution.

CONCLUSION

I do not participate in the entry of the order or the Court's decision-making under the new disqualification rule. I believe that rule to have serious constitutional flaws. Moreover, my decision not to participate does not violate the duty to sit because deciding whether a fellow justice must be disqualified from hearing a particular case under the current court rule is inconsistent with my judicial duty to uphold the due process requirements of the United States Constitution.

CORRIGAN, J., joins the statement of YOUNG, J.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

0331

March 31, 2010

/s/ Corbin R. Davis
Clerk

APPENDIX G

Rule 2.003 Disqualification of Judge

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(B) Who May Raise. A party may raise the issue of a judge's disqualification by motion or the judge may raise it.

(C) Grounds.

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a) The judge is biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, ___US___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

(c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(d) The judge has been consulted or employed as an attorney in the matter in controversy.

(e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.

(g) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification not warranted.

(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action.

(D) Procedure.

(1)(a) Time for Filing in the Trial Courts. To avoid delaying trial and inconveniencing the witnesses, all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith.

(b) Time for Filing in the Court of Appeals. All motions for disqualification must be filed within 14 days of disclosure of the judges' assignment to the case or within 14 days of the discovery of the grounds for disqualification. If a party discovers the grounds for disqualification within 14 days of a

scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

(c) Time for Filing in the Supreme Court. If an appellant is aware of grounds for disqualification of a justice, the appellant must file a motion to disqualify with the application for leave to appeal. All other motions must be filed within 28 days after the filing of the application for leave to appeal or within 28 days of the discovery of the grounds for disqualification. If a party discovers the grounds for disqualification within 28 days of a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

All requests for review by the entire Court pursuant to subsection (3)(b) must be made within 14 days of the entry of the decision by the individual justice.

(d) Untimely Motions. Untimely motions in the trial court, the Court of Appeals, and the Supreme Court may be granted for good cause shown. If a motion is not timely filed in the trial court, the Court of Appeals, or the Supreme Court, untimeliness is a factor in deciding whether the motion should be granted.

(2) All Grounds to be Included; Affidavit. In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) Ruling.

(a) For courts other than the Supreme Court, the challenged judge shall decide the motion. If the challenged judge denies the motion,

(i) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(ii) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of

the motion for disqualification. Any concurring or dissenting statements shall be in writing.

(4) If Disqualification Motion is Granted.

(a) For courts other than the Supreme Court, when a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.

(E) Waiver of Disqualification. Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive the disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.